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IN THE

Supreme Court of the United States

EXXON MOBIL CORPORATION, ET AL.,
Petitioners,

v.

JOHN DOE I, ET AL.
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Where a lawsuit challenges the activities of a foreign government, and the Executive warns that the litigation itself, and not just the effects of a final judgment, would risk a potentially serious adverse impact on significant foreign policy interests of the United States, does the collateral order doctrine permit immediate appeal of a district court's denial of a motion to dismiss under the political question doctrine?

PARTIES TO THE PROCEEDING

Petitioners are Exxon Mobil Corporation, Mobil Corporation, Mobil Oil Corporation, and ExxonMobil Oil Indonesia Inc. Petitioners are the defendants-appellants below. PT Arun LNG Co. was named as a defendant in the trial court, but was dismissed from the case and is not a party on appeal.

Respondents are Indonesian citizens, John Does I through VII and Jane Does I through VI.

PETITIONERS' CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 29.6, Petitioners hereby identify any parent corporation and any publicly-held corporation owning 10% or more of its stock:

Exxon Mobil Corporation: Exxon Mobil Corporation has no parent corporation and no publicly-held corporation owning 10% or more of its stock.

Mobil Corporation: Exxon Mobil Corporation is the parent of Mobil Corporation and owns 100% of the stock of Mobil Corporation.

Mobil Oil Corporation (now known as ExxonMobil Oil Corporation): Mobil Corporation is the parent of ExxonMobil Oil Corporation and owns 100% of the stock of ExxonMobil Oil Corporation. Exxon Mobil Corporation is the parent of Mobil Corporation and owns 100% of the stock of Mobil Corporation.

ExxonMobil Oil Indonesia Inc.: Mobil Exploration and Producing North America Inc. is the parent of ExxonMobil Oil Indonesia Inc. and owns 100% of the stock of ExxonMobil Oil Indonesia Inc. Mobil Corporation is the parent of Mobil Exploration and Producing North America Inc. and owns 100% of the stock of Mobil Exploration and Producing North America Inc. Exxon Mobil Corporation is the parent of Mobil Corporation and owns 100% of the stock of Mobil Corporation.

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OPINIONS AND ORDERS BELOW

The Court of Appeals' opinion below is reported at *Doe v. Exxon Mobil Corp.*, 473 F.3d 345 (D.C. Cir. 2007). The opinion and accompanying order are reprinted in the Appendix to the Petition ("Appx.") at 1a to 45a

The District Court's opinion below is reported at *Doe v. Exxon Mobil Corp.*, 393 F. Supp. 2d 20 (D.D.C. 2005). The opinion and accompanying order are reprinted at Appx. 46a to 63a.

STATEMENT OF JURISDICTION

The order sought to be reviewed was entered by the United States Court of Appeals for the District of Columbia Circuit on January 12, 2007. An order denying panel rehearing was entered by the same court on February 21, 2007.

Jurisdiction is conferred on this Court by 28 U.S.C. § 1254(1).

APPLICABLE STATUTES

The following statutes are pertinent to this petition:

28 U.S.C. § 1291

> The courts of appeals (other than the United States Court of Appeals for the Federal Circuit) shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court. The jurisdiction of the United States Court of Appeals for the Federal Circuit shall be limited to the jurisdiction described in sections 1292(c) and (d) and 1295 of this title.

28 U.S.C. § 1332(a)(2)

> The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $75,000, exclusive of interest and costs and is between—(2) citizens of a State and citizens or subjects of a foreign state.

28 U.S.C. § 1350

> The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States.

28 U.S.C. § 1651(a)

> The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.

STATEMENT OF THE CASE

In June 2001, Respondents filed a complaint alleging that they had "been subjected to serious human rights abuses, including genocide, murder, torture, crimes against humanity, sexual violence, and kidnapping in violation of the Alien Tort [Statute] ("ATS"), 28 U.S.C. § 1350, the Torture Victims Protection Act ("TVPA"), 28 U.S.C. § 1350 (note), international human rights law, and statutory and common tort law of the District of Columbia" at the hands of "members of the Indonesian military hired to perform 'security' services on behalf of Defendants" in the province of Aceh, Indonesia. (Appx. at 92a.)

Petitioners moved to dismiss the complaint in October 2001, asserting, among other things, that Respondents' claims involved a nonjusticiable political question challenging the conduct of the Indonesian military during the Aceh civil war. The District Court sought the "opinion (non-binding) as to whether adjudication of this case at this time would impact adversely on interests of the United States, and, if so, the nature and significance of that impact." (*Id.* at 64a-65a.)

In response, the United States submitted a letter dated July 29, 2002, from the Legal Adviser of the United States Department of State ("Statement of Interest"), together with a July 15, 2002 letter from the Indonesian Ambassador to the United States. The Indonesian Ambassador's letter stated that the Indonesian government "cannot accept the extra-territorial jurisdiction of a United States Court over an allegation against an Indonesian government institution [that is] the Indonesian military, for operations taking place in Indonesia." (*Id.* at 139a.) It also warned that "adjudication" of the case "will definitely compromise the serious efforts of the Indonesian government to guarantee the safety of foreign investments," and would "have an adverse impact on the process to find a peaceful and satisfactory solution on the problem of Aceh." (*Id.* at 139a-140a.)

The United States' Statement of Interest affirmed that the lawsuit would be "perceived in Indonesia as a U.S. court trying the GOI [Government of Indonesia] for its conduct [in] Aceh," and that this perceived affront to Indonesian sovereignty could translate into adverse consequences to important United States foreign policy interests. (*Id.* at 134a-135a.) In particular, "U.S. counterterrorism initiatives could be imperiled in numerous ways if Indonesia and its officials curtailed cooperation in response to perceived disrespect for its sovereign interests." (*Id.* at 135a.) The Statement of Interest also confirmed that "[t]his litigation appears likely to further discourage foreign investment" which "could have decidedly negative consequences for the Indonesian economy" and could "prejudice the Government of Indonesia and Indonesian businesses against U.S. firms bidding on contracts in extractive and other industries." (*Id.* at 136a-138a.)

These foreign policy considerations led the Statement of Interest to conclude that

> the Department of State believes that adjudication of this lawsuit at this time would in fact risk a potentially serious adverse impact on significant interests of the United States, including interests related directly to the on-going struggle against international terrorism. It may also diminish our ability to work with the Government of Indonesia ("GOI") on a variety of important programs, including efforts to promote human rights in Indonesia.

(*Id.* at 133a.) A footnote in the Statement of Interest advised that much of the Department's "assessment is necessarily predictive and contingent on how the case might unfold in the course of litigation," (*id.* at 134a), but the Statement of Interest repeated that "it is the Department's considered opinion that adjudication at this time could adversely affect United States interests," (*id.*).

On several occasions over the next five years, the United States and the Government of Indonesia reaffirmed their objections. In July 2003, the United States submitted a second statement of interest, stressing that "[i]t remains the United States' position that adjudication of this case would raise foreign policy and national security concerns for the reasons articulated in the State Department's [July 2002] letter." (*Id.* at 142a.) In May 2005, while the Petitioners' October 2001 motion to dismiss was still under advisement, the United States restated its position during a status conference, and reminded the District Court that "[t]he Indonesian ambassador . . . [i]ndicat[es] that any adjudication of this case, including the discovery process, which would air information on what the security forces did would not only be an affront to them, but also would possibly create instability in Indonesia." (*Id.* at 166a, 173a.) Then, in a June 2005 diplomatic note, the government of Indonesia reiterated its concerns expressed in July 2002 and stressed in exasperated tones that "limited discovery as proposed by the plaintiffs is unacceptable to Indonesia. The Embassy . . . requests the esteemed [State] Department to help ensure that the judicial sovereignty of the Republic of Indonesia be fully and thoroughly respected." (*Id.* at 184a.) This was followed by a third statement of interest in July 2005, in which the United States advised that its previously stated concerns were still current. (*Id.* at 183a.) The Indonesian government sent another diplomatic note to the State Department in February 2007, "reaffirm[ing] its position as contained in the previous correspondences." (*Id.* at 185a.)

On October 14, 2005, the District Court dismissed Respondents' federal statutory claims under the ATS and TVPA for failure to state a claim and lack of subject matter jurisdiction. (*Id.* at 46a.) In its decision, the District Court noted among other things that "determining whether defendants engaged in joint action with the Indonesian military necessarily would require . . . an inquiry [that] cuts too close to

adjudicating the actions of the Indonesian government." (*Id.* at 58a.) The District Court further stated that "assessing whether Exxon is liable for these international law violations [genocide and crimes against humanity] would be an impermissible intrusion in Indonesia's internal affairs." (*Id.* at 55a.)

Specifically, the District Court held that

- Petitioners could not be held liable for violations of international law on an aiding and abetting theory (*id.* at 53a);
- Respondents' claims of "sexual violence" did not meet this Court's test in *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004) for a "specific, universal, and obligatory" international norm actionable under the ATS (*id.* at 54a);
- Respondents' claims of genocide and crimes against humanity would impermissibly "require adjudication on whether the Indonesian military was engaged in a plan allegedly to eliminate segments of the population" (*id.* at 55a);
- Respondents' claims of torture, arbitrary detention, and extrajudicial killing under the ATS could only be brought against states. Attempting to bring such claims against individuals on a "color of law" theory would "dramatically expand the extraterritorial reach" of the ATS (*id.* at 56a);[1]
- Respondents' TVPA claims could not be brought against corporations, only human beings (*id.* at 60a);

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[1] The District Court further concluded that even if a "color of law" theory could be applied to Respondents' ATS claims, Respondents had failed to allege adequately either joint action or proximate cause, the two potential bases upon which "color of law" might be premised. (Appx. at 57a.)

- Respondents' "violence against women" claims were redundant of the defective ATS and TVPA claims (*id.*).

The District Court also dismissed all claims against original defendant PT Arun, on the grounds that PT Arun was 55% owned by an agency of the Indonesian government and that litigation against PT Arun "would create a significant risk of interfering in Indonesian affairs and thus U.S. foreign policy concerns." (*Id.* at 61a.)

At this point, all that remained of Respondents' initial claims were state law tort claims resting on the identical factual predicate with respect to the alleged behavior of the Indonesian military as did the dismissed federal claims, and thus also requiring an adjudication of the actions of the Indonesian military in Indonesia during a civil war. Nonetheless, the District Court allowed the state law claims to proceed. (*Id.*) It based its holding, in part, on the mistaken belief that discovery and litigation could be focused in the United States in a manner that would not be offensive to Indonesian sovereignty and would mitigate the other concerns expressed by the State Department and the Government of Indonesia. (*Id.*) The District Court subsequently entered two orders limiting discovery to documents located outside of Indonesia relating to the issues of personal jurisdiction over Petitioner ExxonMobil Oil Indonesia, Inc. ("EMOI")[2] and the knowledge and participation of the U.S. Defendants in any of the allegedly tortious conduct. (*Id.* at 81a, 84a.) Discovery on those issues is to conclude by July 31, 2007, and the Court's scheduling order provides that Petitioners may file a motion to dismiss EMOI for lack of personal jurisdiction in October 2007, and that Petitioners may file a summary judg-

[2] EMOI alleges it has no contacts with the District of Columbia, and the District Court is permitting discovery on the issue of whether EMOI is the alter-ego of the other Petitioners such that their contacts with the District of Columbia may be attributed to EMOI.

ment motion to dismiss the remaining U.S.-based Petitioners in January 2008. The District Court has also set a trial date for June 27, 2008.

On November 10, 2005, Petitioners noticed an appeal of the District Court's October 14, 2005 order insofar as it denied the justiciability defense as to the state law tort claims. Petitioners asserted that jurisdiction in the Court of Appeals was appropriate under the collateral order doctrine, *see Digital Equip. Corp. v. Desktop Direct, Inc.*, 511 U.S. 863, 868 (1994), and alternatively petitioned for a writ of mandamus, *see* 28 U.S.C. § 1651(a). Respondents moved to dismiss the appeal for lack of appellate jurisdiction, and a decision on that motion was reserved for the merits panel.

On January 12, 2007, a divided panel of the D.C. Circuit Court of Appeals dismissed the appeal for lack of jurisdiction and denied the petition for a writ of mandamus. The majority determined that the justiciability issue was not effectively unreviewable upon an appeal from final judgment, rendering the issue inappropriate for immediate appeal under the collateral order doctrine. (Appx. at 12a.) In particular, the majority concluded that a separation of powers defense, unaccompanied by a claim of immunity, is not immediately appealable under the collateral order doctrine. (*Id.* at 13a.) The majority further reasoned that permitting a collateral order doctrine appeal in this matter would "substantially expand[]" the collateral order doctrine. (*Id.* at 15a.)

The majority also denied the petition for mandamus, finding that the District Court had not "'clearly and indisputabl[y]' exceeded its jurisdiction by refusing to dismiss this case under the political question doctrine." (*Id.* at 16a (alteration in original).) In searching for a "clear and indisputable" error, the majority noted specifically that the July 29, 2002 Statement of Interest was "not . . . an unqualified opinion that this suit must be dismissed," that the State Department "did not necessarily expect the district court to

immediately dismiss the case in its entirety," and that "the district court ha[d] taken several steps to limit the scope of the litigation," including the dismissal of PT Arun, dismissal of the federal claims and limitations on discovery. (*Id.* at 17a-18a.) Citing *Sosa*, the majority concluded:

> Thus, we need not decide what level of deference would be owed to a letter from the State Department that *unambiguously* requests that the district court dismiss a case as a non-justiciable political question. *See Sosa v. Alvarez-Machain*, 542 U.S. 692, 733 n.21 (2004) (suggesting that when the State Department files a statement of interest "there is a strong argument that federal courts should give serious weight to the Executive Branch's view of the case's impact on foreign policy"). . . . But given the letter before us in the record, we cannot say it is "indisputable" that the district court erroneously failed to dismiss plaintiffs' claims under the political question doctrine, no matter what level of deference is owed to the State Department's letter.

(*Id.* at 18a.)

In dissent, Judge Kavanaugh would have granted the petition for mandamus. Judge Kavanaugh believed that the majority opinion gave "unduly short shrift to the State Department's Statement of Interest." (*Id.* at 38a.) He concluded that the State Department's letter provided sufficient explanation of the potential adverse foreign policy consequences of the litigation to warrant dismissal, and that the steps taken by the District Court—to dismiss some claims but not others, to dismiss one defendant but not all defendants, and to limit the scope of discovery—were not consistent with the Executive's multiple cautionary statements. (*Id.* at 36a-37a, 43a-44a.) He further noted that the State Department's concerns were implicated not only by a potential judgment in this matter regarding the Indonesian soldiers' conduct, but by "*the litigation itself.*" (*Id.* at 44a (emphasis in original).)

Judge Kavanaugh also noted that the remaining state law claims, to be adjudicated principally under District of Columbia law, posed the additional problem of federal foreign affairs preemption. (*Id.* at 37a.) During the pendency of the appeal, the District Court in March 2006 granted Respondents' leave to file an amended complaint, which reasserted most of the same facts as the original complaint and the state law tort claims, but asserted federal diversity jurisdiction, 28 U.S.C. § 1332(a)(2), as the basis for subject matter jurisdiction over the remaining claims. (*Id.* at 68a-69a.) At the same time, the District Court held that the state law claims would be governed by "United States" common and statutory law, rather than the law of Indonesia. (*Id.* at 71a.) In selecting among the laws of potential states,[3] the District Court concluded that the only conflict among the laws of the states related to the wrongful death claims.[4] (*Id.*) Concluding that Petitioner EMOI was the defendant whose actions were most relevant to the case, and observing that EMOI was incorporated in Delaware during the relevant period, the District Court resolved to apply Delaware law to Respondents' wrongful death claims. (*Id.*) For the remaining common law claims, the District Court noted no conflict among the laws of the states and simply selected District of Columbia law as the law of the forum. (*Id.*) In so holding, the District Court noted that Indonesian law does not provide for punitive damages, and concluded that exposing Petitioners to potential punitive damages would serve the United States'

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[3] The parties briefed the potential applicability of District of Columbia law (as the forum), Indonesian law (as the place of alleged injury and principal place of business of EMOI), as well as that of Delaware (state of incorporation of EMOI), New Jersey (state of incorporation of Exxon Mobil Corp.), and Texas (principal place of business of Exxon Mobil Corp.).

[4] The conflict with respect to the wrongful death claims arose because the District of Columbia wrongful death statute does not apply to deaths occurring outside of the District.

"overriding interest" in applying its own laws to Petitioners: "Ultimately, the United States, the leader of the free world, has an overarching, vital interest in the safety, prosperity, and consequences of the behavior of its citizens, particularly its super-corporations conducting business in one or more foreign countries." (*Id.* at 70a.)

Shortly after the Court of Appeals' decision, on February 1, 2007, the Indonesian government "reaffirm[ed]" its earlier objections in a third written complaint about the litigation, noting in particular that the state law claims had not been dismissed. (*Id.* at 185a.)

On February 12, 2007, Petitioners moved the panel to reconsider its January 12, 2007 decision. The panel thereafter denied Petitioners' petition for rehearing on February 21, 2007, with Judge Kavanaugh again dissenting. (*Id.* at 90a.)

REASONS FOR GRANTING THE PETITION

In this proceeding, the Executive has given its "considered judgment" that the adjudication of Respondents' claims would risk a potentially serious adverse impact on significant foreign policy interests of the United States, and has restated that warning three separate times. Yet the District Court dismissed only Respondents' federal claims, permitting state common law and statutory claims to proceed on identical factual allegations over the objection that they should have been dismissed on political question grounds. The Court of Appeals refused to review the District Court's decision not to dismiss the remaining state claims under the collateral order doctrine, erroneously concluding that the potential harm resulting from the District Court's adjudication of the case could be remedied after final judgment. A majority of the panel also refused to order the state law claims dismissed via writ of mandamus, in reliance on a finding that the State Department had never explicitly requested dismissal of the litigation.

The Court should grant certiorari for three reasons. First, the majority opinion fails to recognize that the State Department warned that the litigation itself would likely cause serious harm to U.S. foreign policy interests; such harm is effectively unreviewable on appeal, because by the time of final judgment the damage has already been done. Second, in the absence of the right to appeal under the collateral order doctrine, relief through a petition for a writ of mandamus, at least as interpreted by the Court of Appeals below, suggests a standard of review that is incompatible with the standard of deference owed to Executive statements of interests concerning the potential foreign policy effects of cases challenging the actions of foreign governments abroad. Third, the recent surge of litigation filed in U.S. courts alleging harm caused by overseas conduct of foreign sovereigns highlights the necessity for immediate appellate review in the rare circumstance where a district court fails to dismiss after a cautionary Executive statement of interest.

I. THE COURT SHOULD DETERMINE THAT THE COLLATERAL ORDER DOCTRINE PERMITS AN IMMEDIATE APPEAL FROM A DISTRICT COURT'S FAILURE TO HEED THE EXECUTIVE'S WARNING THAT CONTINUED ADJUDICATION COULD HARM U.S. FOREIGN AFFAIRS.

The Court should grant certiorari to clarify that when the Executive opines that the continued prosecution of a lawsuit involving the conduct of a foreign government would risk an adverse effect on U.S. foreign policy, and the district court nevertheless declines to dismiss the action, the defendant has an immediate right of appeal under the collateral order doctrine.

The collateral order doctrine is an extension of the final judgment rule, 28 U.S.C. § 1291. The doctrine permits the

immediate appeal of a narrow category of orders that are conclusively decided, important and separate from the merits, and effectively unreviewable upon appeal from final judgment. *See Digital Equip. Corp.*, 511 U.S. at 868; *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541, 546-47 (1949).

Petitioners sought collateral order review of the District Court's determination that the state claims could proceed notwithstanding the political question doctrine. The political question doctrine has its roots in constitutional separation of powers, which, among other things, requires the Judiciary to yield in matters that would impermissibly interfere with the constitutional duties of the Executive, especially in the realm of foreign relations. *Baker v. Carr*, 369 U.S. 186, 211, 217 (1962). This Court has consistently recognized the primacy of the Executive in foreign policy matters. *See Am. Ins. Ass'n v. Garamendi*, 539 U.S. 396, 414 (2003) (discussing the President's "vast share of responsibility for the conduct of our foreign relations"); *Christopher v. Harbury*, 536 U.S. 403, 417 (2002) ("[F]oreign policy [is] the province and responsibility of the Executive") (alterations in original) (*quoting Dep't of the Navy v. Egan*, 484 U.S. 518, 529 (1988)); *Baker*, 369 U.S. at 211 (Many questions touching on foreign affairs "involve the exercise of a discretion demonstrably committed to the executive" or "uniquely demand single-voiced statement of the Government's views.").

The majority below agreed that the District Court's decision not to dismiss the case under the political question doctrine was final and important and separate from the merits, satisfying the first two elements of the collateral order doctrine. (Appx. at 9a-10a.) However, the majority held that the political question determination was not effectively unreviewable on appeal, and therefore dismissed the appeal for want of jurisdiction. (*Id.* at 16a.)

A. The Failure To Dismiss A Case Under The Political Question Doctrine Is Effectively Unreviewable On Appeal Where Continuation Of The Litigation Itself Will Cause Harm, Regardless Of The Result.

The majority opinion below thoroughly and accurately recounts that under this Court's precedents, a right that is "effectively unreviewable" is "'an asserted right the legal and practical value of which would be destroyed if it were not vindicated before trial.'" (Appx. at 10a (citation omitted).) It also correctly points out that not every claim of the right to avoid trial is sufficient to trigger the doctrine, but such interest must be "buttressed by 'some particular value of high order," such as "honoring the separation of powers . . . ." (*Id.* at 11a.) However, without any direct support, and ignoring the statements by the Executive in this case indicating that the conduct of the litigation itself would cause harm, the majority concluded that the only "separation of powers" issue that merits collateral review is a claim of immunity. (*Id.* at 13a.)

Petitioners respectfully assert that the majority erred. The Executive clearly stated that it was not simply concerned about whether the impugned Indonesian military ultimately would be condemned or vindicated; it was independently concerned about the offense that would be taken by the Indonesian government to the litigation process and the intrusion of that process on Indonesian sovereignty:

> We anticipate that adjudication of this case will be perceived in Indonesia as a U.S. court trying the GOI for its conduct of a civil war in Aceh . . . . In the letter [Indonesian] Ambassador Soemadi expresses his government's objections to the *continued* adjudication of this case. He states that Indonesia views this litigation as an unacceptable extraterritorial act . . . .

(*Id.* at 134a, 138a (emphasis added).) To underscore the point, the Executive in May 2005 and July 2005 reaffirmed

the July 2002 letter and joined in the Indonesian government's objection to discovery as initially proposed by Respondents. (*Id.* at 183a, 173a ("[t]he Indonesian ambassador . . . indicat[es] that *any* adjudication of this case, *including the discovery process*, which would air information on what the security forces did would not only be an affront to them, but also would possibly create instability in Indonesia.") (emphasis added).)

The majority misinterpreted Petitioners' argument as advocating application of the collateral order doctrine whenever the "district court order den[ies] a motion to dismiss based on the separation of powers." (*Id.* at 13a-14a.) Petitioners' interpretation of the collateral order doctrine is, however, much narrower. The political question doctrine determination in this case is effectively unreviewable on appeal, not simply because it presents separation of powers issues, but rather because the discovery and litigation itself is an affront to Indonesian sovereignty. This is confirmed by the repeated objections by the United States and Government of Indonesia over a five-year period. (*Id.* at 133a, 139a, 142a, 166a, 183a, 184a, 185a.) Thus, in dissent, Judge Kavanaugh correctly recognized that "the U.S. foreign policy interest here is not simply avoiding the effects of a final judgment, [it] is in avoiding the repercussions of *the litigation itself*." (*Id.* at 44a (emphasis in original).)

Because the conduct of the litigation is itself an independent source of grievance, in the analogous context of litigation under the Foreign Sovereign Immunities Act, 28 U.S.C. §§ 1602, *et seq.* ("FSIA"), the denial of a motion to dismiss is immediately appealable under the collateral order doctrine. *See, e.g., Simpson ex rel. Estate of Mostafa Karim v. Socialist People's Libyan Arab Jamahiriya*, 470 F.3d 356, 359 (D.C. Cir. 2006); *FG Hemisphere Assocs., LLC v. Republique du Congo*, 455 F.3d 575, 584 (5th Cir. 2006). To Petitioners' knowledge, every Court of Appeals to consider

this question of appellate jurisdiction has held that the collateral order doctrine applies to the FSIA. This is because courts recognize that exposing a foreign sovereign to the indignity of litigation in the United States is a harm that cannot be remedied upon later appeal. Because foreign sovereigns may legitimately take offense to litigations in the United States even if they are not named as defendants—*see Garamendi*, 539 U.S. at 416 ("[T]he distinction [between corporations and foreign governments] does not matter. Historically, wartime claims against even nominally private entities have become issues in international diplomacy."); *United States v. Munoz-Flores*, 495 U.S. 385, 394 (1990) (the political question "doctrine is designed to restrain the Judiciary from inappropriate interference in the business of the other branches of Government; the identity of the *litigant* is immaterial to the presence of these concerns in a particular case") (emphasis in original)—the same prudential reasons creating an immediate avenue for appeal in FSIA cases should also apply to political question justiciability issues where the State Department has offered a letter expressing concern about the effect of prosecution of a lawsuit, (*see* Appx. at 44a (analogizing concerns in instant litigation to doctrine of foreign sovereign immunity).)

At least one other Circuit has held that the denial of a motion to dismiss on political question grounds based on an Executive statement of interest should be appealable under the collateral order doctrine. *767 Third Ave. Assocs. v. Consulate Gen. of Socialist Fed. Republic of Yugo.*, 218 F.3d 152 (2d Cir. 2000). *767 Third Avenue* was a landlord-tenant dispute involving a building occupied by the former government of Yugoslavia. *Id.* at 152-53. The Department of State submitted a statement of interest opining that apportionment of state liability among potential successor states constituted a political policy decision reserved to the Executive Branch. The district court agreed to stay the case, but refused to dismiss it on political question grounds. *Id.* at 158-59. The

Second Circuit accepted an immediate appeal from the district court's failure to dismiss the case for two independent reasons, one of which was that the lower court's ruling under the political question doctrine was appealable under the collateral order doctrine. *Id.*

This matter presents an even more compelling case for application of the collateral order doctrine. Whereas in *767 Third Avenue* the district court was called upon merely to identify a successor state and award contract damages, here the District Court is impermissibly tasked with examining the allegedly tortious conduct of a sovereign military acting within its own borders and against its own citizens, after expressly finding in part that adjudicating identical allegations arising under federal statutes would impermissibly affect U.S. foreign relations.

With a trial on that issue potentially to occur in less than a year, immediate appellate review of the constitutional ability of the District Court to entertain the matter under the political question doctrine is necessary.

B. The Court of Appeals' Failure To Review The Justiciability Issue Under The Collateral Order Doctrine Resulted In An Anomalous Ruling That An Executive Statement of Interest Must Explicitly Request Dismissal To Warrant Deference.

Having concluded that the collateral order doctrine does not apply to review of Petitioners' claims, the majority reviewed the justiciability question under the mandamus standard of "clear and indisputable" error. From that narrow perspective, the majority focused heavily on the State Department's failure to explicitly demand dismissal of the litigation, concluding that deference to the State Department is not required when such a demand is absent. This unprecedented approach was sharply inconsistent with this

Court's decisions in *Sosa v. Alvarez-Machain*, 542 U.S. 692, 733 n.21 (2004) and *Republic of Austria v. Altmann*, 541 U.S. 677, 702 (2004), and illustrates the inadequacy of confining appellate review solely to the extraordinary writ of mandamus procedure in circumstances where a district court does not dismiss a case after receipt of a cautionary Executive statement of interest.

In *Sosa* and *Altmann*, this Court stated that in a case alleging torts committed abroad against non-U.S. citizens involving allegedly wrongful conduct by a foreign government, the courts should give "serious weight to the Executive Branch's view of the case's impact on foreign policy," *Sosa*, 542 U.S. at 733 n.21, as the Executive's "considered judgment," *Altmann*, 541 U.S. at 702.

In *Sosa*, the Court provided guidance in defining the boundaries of the jurisdictional reach of claims by non-U.S. residents under the Alien Tort Statute, 28 U.S.C. § 1350. *Sosa*, 542 U.S. at 712-33. One of the applicable jurisdictional boundaries, the Court concluded, is that "federal courts should not recognize private claims under federal common law for violations of any international law norm with less definite content and acceptance among civilized nations than the historic paradigms familiar when § 1350 was enacted." *Id.* at 732. Although that requirement was sufficient to dispose of the *Sosa* case, the Court noted that "case-specific deference to the political branches [that] give[s] serious weight to the Executive Branch's views of the case's impact on foreign policy" might also limit the jurisdictional reach of federal courts over claims under the ATS. *Id.* at 733 n.21.

In *Altmann*, the Court considered whether the Foreign Sovereign Immunities Act, 28 U.S.C. §§ 1602, *et seq.* ("FSIA"), applied to conduct that pre-dated the enactment of the statute. *Altmann*, 541 U.S. at 677, 692-702. The Court declined to agree with the Executive that the FSIA should not apply to pre-enactment conduct, noting that this question was

a "pure question of statutory construction . . . well within the province of the Judiciary" that did not merit special deference. *Id.* at 701 (*citing INS v. Cardoza-Fonseca*, 480 U.S. 421, 446, 448 (1987)). However, the Court also noted that "should the State Department choose to express its opinions on the implications of exercising jurisdiction over *particular* petitioners in connection with *their* alleged conduct, that opinion might well be entitled to deference as the considered judgment of the Executive on a particular question of foreign policy." *Id.* at 701-02 (emphasis in original).

Reviewing under the mandamus standard, the court below declined to give appropriate weight to the State Department's Statement of Interest concerning the foreign policy effects of this action on U.S.-Indonesian relations, because, in the majority's view, the State Department did not "unambiguously" request dismissal. (Appx. at 18a.) But nothing in *Sosa* or *Altmann* suggests that the Executive's "considered judgment" must be accompanied by an explicit demand for dismissal. Nevertheless, the majority placed such great weight on the absence of an explicit dismissal request from the State Department that it largely ignored the balance of the State Department's letter, which repeatedly warned of "significant" U.S. foreign policy interests imperiled by the litigation—it also ignored the repeated reiterations of objections by the Indonesian government and the endorsement of those objections by the United States and it completely failed to conduct a justiciability analysis under *Baker*. (*See generally id.* at 17a-22a.)[5]

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[5] Despite the Executive's clearly expressed judgment that continuation of the litigation would be considered an affront to the sovereignty of Indonesia and would risk adverse effects on important U.S. foreign policy objectives—including counterterrorism efforts, the ability of U.S. firms to compete fairly for oil extraction and production contracts, and maintaining the stability of Indonesia's economy and of the Aceh region—the majority below found ambiguity in the Statement of Interest by relying on

The error in the majority's analysis becomes more apparent when examined against the State Department's statement of interest in *In re South African Apartheid Litigation*. (*See id.* 193a-196a.) Like the Statement of Interest in this case, the statement of interest in *Apartheid Litigation* does not explicitly demand dismissal of the case and notes the adverse foreign policy effects of the litigation as potential consequences, rather than certain ones. (*Id.*) But this Court in *Sosa* cited the statement of interest in *Apartheid Litigation* as a model for those entitled to deference. 542 U.S. at 733 n.21.

The majority's mistaken and narrow emphasis on the State Department's failure to explicitly demand dismissal is all the more striking and inappropriate because the District Court (appropriately) did not ask for the State Department's opinion on whether the complaint should be dismissed. Instead, the District Court asked for an "opinion (non-binding) as to whether adjudication of this case at this time would impact adversely on interests of the United States, and, if so, the nature and significance of that impact." (*Id.* at 65a.) The Executive Branch's response was completely in keeping with the question it had been asked: "Because the Court had requested only policy input from the State Department, the State Department's letter specifically did not address the legal issues before the Court." (*Id.* at 142a.)

Contrary to the clear implication of the majority's holding, the ultimate resolution of justiciability is within the province

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a footnote in the document that noted, unsurprisingly, that assessing the future foreign policy implications of a complex litigation in the context of a then-on-going civil war was "necessarily predictive." (Appx. at 134a.) The majority found particular meaning in this footnote, written in 2002, notwithstanding that the United States thereafter had reaffirmed its conclusion (in the body of the letter) that "adjudication of this lawsuit at this time would in fact risk a potentially serious adverse impact on significant interests of the United States" three times over the ensuing three years. (*Id.* at 142a, 166a, 183a.)

of the Judiciary. In this regard, the history of the FSIA is instructive. Before enactment of the FSIA, courts routinely relied upon the Executive to decide whether a particular state ought to be immune from a particular claim. *See Verlinden B.V. v. Cent. Bank of Nigeria*, 461 U.S. 480, 487 (1983) ("[I]nitial responsibility for deciding questions of sovereign immunity fell primarily upon the Executive acting through the State Department, and the courts abided by 'suggestions of immunity' from the State Department.").[6] This regime proved uncomfortable, because it appeared to be a judicial abdication of its role to address justiciability. *See id.* at 488; *Dames & Moore v. Regan*, 453 U.S. 654, 685 (1981) ("The principal purpose of the FSIA was to codify contemporary concepts concerning the scope of sovereign immunity *and withdraw from the President the authority to make binding determinations* of the sovereign immunity to be accorded foreign states.") (emphasis added).[7] The FSIA was enacted to return such decisions to courts. 28 U.S.C. § 1602 ("Claims of foreign states to immunity should henceforth be decided by courts of the United States and of the States in conformity with the principles set forth in this chapter."); *Altmann*, 541 U.S. at 691 ("The Act . . . transfers primary responsibility for immunity determinations from the Executive to the Judicial Branch."). The majority's emphasis on the existence or non-existence of an explicit demand for dismissal in the political question doctrine context is directly contrary to this history of FSIA jurisprudence.

To date, at least one court has concluded, based on the decision below, that "the level of deference due a Statement

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[6] *See also Siderman de Blake v. Republic of Argentina*, 965 F.2d 699, 705 (9th Cir. 1992) ("[T]he courts continued to defer to the Executive Branch. When the State Department issued a suggestion of immunity in a particular case, the court followed it . . . .").

[7] *See also* H.R. No. 94-1487, at 7-8 (1976), *reprinted in* 1976 U.S.C.C.A.N. 6604, 6605-06 (discussing purpose of FSIA).

of Interest turns on whether the Executive Branch merely voices foreign-policy concerns or instead directly requests that a suit be dismissed as nonjusticiable." *Beaty v. Republic of Iraq*, 480 F. Supp. 2d 60, 82 (D.D.C. 2007) (*citing Doe*, 473 F.3d at 354).

Because the decision below reviewed the political question justiciability issue under the wrong appellate standard, with an aberrational result, the Court should step in now to prevent additional courts from following its path.[8]

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[8] The Court of Appeals decision to permit the common law and statutory claims to proceed even after the federal claims were dismissed is problematic for an additional doctrinal reason. While federal statutes such as the Alien Tort Statute, 28 U.S.C. § 1350, and the Torture Victims Protection Act, 28 U.S.C. § 1350 (note), are specifically designed by Congress—a branch of the federal government constitutionally entrusted with foreign affairs issues—to apply to certain extraterritorial claims, the statutory and common law of the states was not developed for that purpose and lacks similar constitutional justification. Thus, as Judge Kavanaugh correctly observed, (Appx. at 37a), the application of state law here threatens significant foreign policy interests without advancing any federal law or legislative mandate, suggesting that state law may be preempted by the contrary federal foreign policy interests. Where the application of state law claims so directly interferes with issues of foreign affairs, a clear standard of deference to the views of the Executive is all the more important. *See Mujica v. Occidental Petroleum Corp.*, 381 F. Supp. 2d 1164, 1185-88 (C.D. Cal. 2005) (foreign affairs preemption doctrine barred Colombian plaintiffs' California state tort claims arising from air raids by Colombian air force; federal foreign policy interests outweighed California's interest in adjudicating the tort claims) (*citing Am. Ins. Ass'n v. Garamendi*, 539 U.S. 396 (2003) and *Zschernig v. Miller*, 389 U.S. 429 (1968)). A clear standard of deference applicable to U.S. statements of interest is particularly important given the possibility, as exemplified by this case, that the common law of the 50 different states could govern claims principally relating to the overseas conduct of foreign sovereigns.

C. The Growing Number Of Cases Brought By Non-U.S. Plaintiffs Alleging Harm Caused Abroad By Foreign Governments Strongly Suggests The Need For Direct Appellate Review Under The Collateral Order Doctrine.

The number of cases brought in United States courts alleging wrongdoing by foreign governments is rising rapidly. This Court's guidance therefore is urgently needed to address the availability of immediate appellate review in the rare instance where a district court permits such litigation to proceed despite a statement of interest from the Executive suggesting serious potential adverse consequences.

In dissent, Judge Kavanaugh observed that since *Doe I v. Unocal Corp.*, 963 F. Supp. 880, 883-84 (C.D. Cal. 1997), "foreign citizens have begun bringing human rights lawsuits against multinational corporations in U.S. courts," often "directly or indirectly target[ing] actions of foreign government officials." (Appx. at 23a.) Examples of such cases in recently reported decisions are abundant. *See, e.g., Sarei v. Rio Tinto LLC*, 487 F.3d 1193 (9th Cir. 2007) (Papua New Guinean plaintiffs alleging corporate liability for human rights abuses by Papua New Guinea military); *Bigio v. Coca-Cola Co.*, 448 F.3d 176 (2d Cir. 2006) (Egyptian plaintiff alleging subsequent acquisition by corporation of property wrongfully nationalized by Egyptian government), *cert. denied*, 127 S. Ct. 1842 (2007); *Herero People's Reparations Corp. v. Deutsche Bank, A.G.*, 370 F.3d 1192 (D.C. Cir. 2004) (Namibian tribe alleging corporate liability for late 19th and early 20th century torture, slavery, and genocide by Germany in Namibia); *Doe I v. Unocal Corp.*, 395 F.3d 932 (9th Cir. 2002) (Burmese plaintiffs alleging corporate liability for human rights abuses by Burmese military); *Wiwa v. Royal Dutch Petroleum Co.*, 226 F.3d 88 (2d Cir. 2000) (Nigerian plaintiffs alleging corporate liability for human rights abuses by Nigerian government); *Carmichael v. United Techs. Corp.*, 835 F.2d 109 (5th Cir. 1988) (British plaintiff alleging

corporate liability for imprisonment and torture by Saudi Arabian government); *Xiaoning v. Yahoo*, No. 07-2151 (N.D. Cal. filed Apr. 18, 2007) (Chinese plaintiffs alleging corporate liability for human rights abuses by Chinese government); *Bauman v. DaimlerChrysler AG*, No. 04-00194, 2007 U.S. Dist. LEXIS 13116 (N.D. Cal. Feb. 12, 2007) (Argentinean and Chilean plaintiffs alleging corporate liability for kidnappings, killing, and torture of union activists by Argentinean military); *Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 453 F. Supp. 2d 633 (S.D.N.Y. 2006) (Sudanese plaintiffs alleging corporate complicity in genocide by Sudanese military); *Corrie v. Caterpillar, Inc.*, 403 F. Supp. 2d 1019 (W.D. Wash. 2005) (Palestinian plaintiffs alleging corporate liability for human rights abuses by Israeli military); *Mujica v. Occidental Petroleum Corp.*, 381 F. Supp. 2d 1164 (C.D. Cal. 2005) (Colombian plaintiffs alleging corporate liability for injuries resulting from bombing by Colombian air force); *In re S. African Apartheid Litig.*, 346 F. Supp. 2d 538 (S.D.N.Y. 2004) (South African plaintiffs alleging corporate liability for human rights abuses committed by South African government); *Bowoto v. ChevronTexaco Corp.*, 312 F. Supp. 2d 1229 (N.D. Cal. 2004) (Nigerian plaintiffs alleging corporate liability for human rights abuses by Nigerian military and police); *see also* Patti Waldmeir, FIN. TIMES, Mar. 13, 2003 (discussing "a rash of recent lawsuits that seek to punish human rights abuses abroad by targeting US corporations at home").

The Court observed this trend with some concern in *Sosa*. 542 U.S. at 732 n.21 ("there are now pending in Federal District Court several class actions seeking damages from various corporations alleged to have participated in, or abetted, the regime of apartheid that formerly controlled South Africa" and discussing related foreign policy concerns). These cases typically have minimal connection to the United States, and often "raise sensitive foreign policy issues." (Appx. at 23a) (Kavanaugh, J., dissenting); *see, e.g.*,

Sarei, 487 F.3d at 1198-99; *Corrie*, 403 F. Supp. 2d at 1032; *Mujica*, 381 F. Supp. 2d at 1188; *In re S. African Apartheid Litig.*, 346 F. Supp. 2d at 553-54.

Such cases are also part of a broader trend of filings by non-U.S. plaintiffs against foreign governments and government officials. *See, e.g., Arce v. Garcia*, 434 F.3d 1254 (11th Cir. 2006) (Salvadoran plaintiffs alleging torture by Salvadoran military); *Joo v. Japan*, 413 F.3d 45 (D.C. Cir. 2005) (Chinese, Taiwanese, South Korean, and Filipino plaintiffs alleging sexual slavery and torture in Asia by Japanese military during World War II), *cert. denied*, 546 U.S. 1208 (2006); *Enahoro v. Abubakar*, 408 F.3d 877 (7th Cir. 2005) (Nigerian plaintiffs alleging human rights abuses by Nigerian military), *cert. denied*, 546 U.S. 1175 (2006); *Cabello v. Fernandez-Larios*, 402 F.3d 1148 (11th Cir. 2005) (estate of Chilean decedent alleging extrajudicial killing by Chilean military officer); *Abrams v. Societe Nationale Des Chemins De Fer Francais*, 389 F.3d 61 (2d Cir. 2004) (French plaintiffs alleging forced deportation of Jews during World War II by national French railroad company); *Ye v. Zemin*, 383 F.3d 620 (7th Cir. 2004) (Chinese plaintiffs alleging religious persecution by Chinese government); *Tachiona v. United States*, 386 F.3d 205 (2d Cir. 2004) (Zimbabwean plaintiffs alleging human rights abuses by Zimbabwean government), *cert. denied*, 126 S. Ct. 2020 (2006); *Mohammad v. Bin Tarraf*, 114 Fed. Appx. 417 (2d Cir. 2004) (Canadian plaintiff alleging physical and mental abuse, and wrongful seizure of property, by United Arab Emirates); *Reyes v. Grijalba*, No. 02-22046 (S.D. Fla. 2006) (Honduran plaintiffs alleging torture, abduction, and extrajudicial killing by Honduran army colonel); *Chavez v. Carranza*, 413 F. Supp. 2d 891 (W.D. Tenn. 2005) (Salvadoran plaintiffs alleging human rights abuses by Salvadoran military); *Mehinovic v. Vuckovic*, 198 F. Supp. 2d 1322 (N.D. Ga. 2002) (Bosnian plaintiffs alleging human rights abuses by Bosnian-Serb soldier). Numerous observers have identified

this trend. *See, e.g.*, *Old Law, New Questions*, WASH. POST, July 20, 2004, at A16 (noting a "flood of litigation . . . over conduct that, however horrible, is not obviously the province of America's courts to redress"); Arthur Fergenson & John Merigan, *There They Go Again*, BRIEFLY, Vol. 11, No. 1, at 28 (2007) (noting an "emerging effort by contingency fee lawyers to construct global ATS class actions with no nexus to the United States"); *Human Rights in Court*, WASH. POST, Apr. 6, 2004 (describing a "raft of litigation over wrongs [that] America's courts have no practical power to address"); Robert H. Bork, *Judicial Imperialism*, WALL ST. J., June 22, 2003; Curtis A. Bradley, *The Costs of Human Rights Litigation*, CHI. J. INT'L L. 457, 458 (Fall 2001) (Extra-territorial litigation in the United States is "undergoing significant expansion, both in terms of the number of cases filed as well as the scope of the claims raised.").

The volume and importance of these cases further suggest that it is time for this Court to announce that, if a district court fails to dismiss a case under the political question doctrine where the Executive has provided a statement of interest warning that the litigation may adversely affect significant U.S. foreign policy interests, an immediate right of appeal exists pursuant to the collateral order doctrine. Such a holding would not significantly expand the collateral order doctrine, as speculated by the majority below, because it is rare, if ever, that a district court has failed to dismiss a case under such circumstances. *See Sarei v. Rio Tinto plc*, 221 F. Supp. 2d at 1192 ("[P]laintiffs have not cited, and the court has not found, a single case in which a court permitted a lawsuit to proceed in the face of an expression of concern such as that communicated by the State Department here."), *rev'd on other grounds*, 487 F.3d 1193 (9th Cir. 2007).[9]

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[9] The district court decision in *Sarei* was reversed by the Ninth Circuit Court of Appeals in part because the United States affirmatively declined to update its position and expressly declined to seek dismissal on political

CONCLUSION

For the foregoing reasons, Petitioners request that the petition for a writ of certiorari be granted.

Respectfully submitted,

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July 20, 2007

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question grounds. *Sarei*, 487 F.3d at 1199, 1207 n.14. The Ninth Circuit also noted that the forum country, Papua New Guinea, had appeared to reverse policy to *favor* the litigation in the United States. *Id.* at 1199, 1207 n.15. The *Sarei* district court's observation that few, if any, district courts have permitted cases to proceed in the fact of a cautionary State Department statement of interest remains accurate, and was not affected by the Ninth Circuit's reversal. *See also Doe I v. Qi*, 349 F. Supp. 2d 1258, 1298 (N.D. Cal. 2004) (endorsing observation by *Sarei* district court that few cases have been permitted to proceed in spite of a State Department warning).

APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT
September Term, 2006

[Filed JAN 12, 2007]

No. 05-7162

JOHN DOE, VILLAGE A. ACEH, INDONESIA, *et al.*,
Appellees,

v.

EXXON MOBIL CORPORATION, *et al.*,
Appellants.

Appeal from the United States District Court
for the District of Columbia
(No. 01cv01357)

Before: SENTELLE and KAVANAUGH, *Circuit Judges*, and EDWARDS, *Senior Circuit Judge*.

JUDGMENT

This cause came on to be heard on the record on appeal from the United States District Court for the District of Columbia and was argued by counsel. On consideration thereof, it is

ORDERED and ADJUDGED that the judgment of the District Court appealed from in this cause is hereby dismissed for lack of jurisdiction, in accordance with the opinion of the court filed herein this date.

Per Curiam

FOR THE COURT
Mark J. Langer, Clerk

BY: /s/ Michael C. McGrail
MICHAEL C. MCGRAIL
Deputy Clerk

Date: January 12, 2007

Opinion for the court filed by Circuit Judge Sentelle.
Dissenting opinion filed by Circuit Judge Kavanaugh.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 05-7162

JOHN DOE, VILLAGE A. ACEH, INDONESIA, *et al.*,
Appellees,

v.

EXXON MOBIL CORPORATION, *et al.*,
Appellants.

Argued November 17, 2006
Decided January 12, 2007

Appeal from the United States District Court
for the District of Columbia
(No. 01cv01357)

Martin J. Weinstein argued the cause for appellants. With him on the briefs were *Robert J. Meyer* and *Paul W. Wright*.

Agnieszka M Fryszman argued the cause for appellees. With her on the brief were *Michael D. Hausfeld*, *Marka Peterson*, and *Terry Collingsworth*.

Before: SENTELLE and KAVANAUGH, *Circuit Judges*, and EDWARDS, *Senior Circuit Judge*.

Opinion for the Court filed by *Circuit Judge* SENTELLE. Dissenting opinion filed by *Circuit Judge* KAVANAUGH.

SENTELLE, *Circuit Judge*: Exxon Mobil Corporation and several of its wholly-owned subsidiaries (hereinafter "Exxon")

appeal from a district court order denying their motion to dismiss. Exxon argues that the district court should have granted the motion to dismiss because the plaintiffs' claims are non-justiciable political questions. We need not reach the merits of Exxon's arguments because we do not have jurisdiction over this appeal. In the alternative, Exxon has requested that we treat its appeal as a petition for a writ of mandamus compelling the district court to dismiss these claims. We deny this petition because Exxon has not established a "clear and indisputable" right to have the plaintiffs' claims dismissed.

I.

Pursuant to a contract with the Indonesian government, Exxon operates a large natural gas extraction and processing facility in the Aceh province of Indonesia. The plaintiffs-appellees are eleven Indonesian villagers from Aceh who allege that Exxon's security forces committed murder, torture, sexual assault, battery, false imprisonment, and other torts. Plaintiffs allege that these security forces were comprised exclusively of members of the Indonesian military, and that Exxon retained these soldiers as guards for the natural gas facility even though Exxon was aware that the Indonesian army had committed human rights abuses in the past. Plaintiffs also allege that these security forces acted under the "direction and control" of Exxon, and that Exxon provided "weapons, funding, military equipment, and other supplies" to these soldiers.

On June 11, 2001, the plaintiffs sued Exxon and PT Arun LNG Company (an unrelated entity) in United States District Court for the District of Columbia. Plaintiffs sought relief under the Alien Tort Statute and the Torture Victims Protection Act. They also brought common law tort claims for wrongful death, assault, battery, arbitrary arrest and detention, false imprisonment, intentional and negligent infliction of emotional distress, negligence (in hiring and supervision),

and conversion. Their complaint seeks compensatory and punitive damages, declaratory relief, attorneys' fees, and an injunction prohibiting the defendants from engaging in similar conduct in the future. The defendants did not answer the complaint; rather, in October 2001, they moved to dismiss the complaint on the grounds that the plaintiffs' claims are non-justiciable political questions.

While the motion to dismiss was pending, the district court solicited the State Department's opinion about whether adjudication of the plaintiffs' claims would interfere with U.S. foreign policy interests. On July 29, 2002, the Legal Adviser to the State Department filed a letter with the district court stating that this litigation "would in fact risk a potentially serious adverse impact on significant interests of the United States." In particular, the State Department was concerned that this suit would harm relations with Indonesia—a key ally in the war on terrorism—and that it would discourage foreign investment in Indonesia. However, the letter also stated that these potential effects on U.S.-Indonesian relations "cannot be determined with certainty." The letter noted that:

> Much of this assessment is necessarily predictive and contingent on how the case might unfold in the course of litigation. E.g., the nature, extent, and intrusiveness of discovery; the degree to which the case might directly implicate matters of great sensitivity to the Government of Indonesia ["GOI"] and call for judicial pronouncements on the official actions of the GOI with respect to the conduct of its military activities in Aceh; the effect that a decision in favor of plaintiffs might encourage secessionist activities in Aceh and elsewhere in Indonesia; whether the case were to go to a jury and, if so whether a substantial monetary award were to be imposed on Exxon Mobil; how other large commercial interests might interpret such a judgment when making investment decisions in Indonesia.

The State Department also attached a letter from the Indonesian ambassador stating that Indonesia "cannot accept" a suit against an Indonesian government institution, and that U.S. courts should not be adjudicating "allegations of abuses of human rights by the Indonesian military." In July 2005, the State Department filed another letter expressing "concerns" about the initial discovery plan in this case; the plaintiffs' proposed discovery plan of May 16, 2005 involved relatively broad discovery that could extend to documents located in Indonesia.

On October 14, 2005, the district court issued an opinion and order granting in part and denying in part the motion to dismiss. *Doe v. Exxon Mobil Corp.*, 393 F. Supp. 2d 20 (D.D.C. 2005). First, the district court dismissed all of the plaintiffs' claims under the Alien Tort Statute and the Torture Victim Protection Act for failure to state a claim and for lack of subject matter jurisdiction. *Id.* at 24-28. These rulings are not challenged on appeal. Second, the district court dismissed all remaining claims against defendant PT Arun LNG Company, an entity that was 55% owned by the Indonesian government. *Id.* at 28. The court held that allowing litigation against this corporation would "create a significant risk of interfering in Indonesian affairs." *Id.* This ruling also is not challenged on appeal. Third, the district court denied Exxon's motion to dismiss the common law tort claims, holding that these claims did not present a non-justiciable political question. *Id.* at 29. However, the court emphasized that even though these claims were not dismissed, the parties must "tread cautiously" and conduct discovery "in such a manner so as to avoid intrusion into Indonesian sovereignty." *Id.* To that end, the district court stated that it would exercise "firm control over any discovery conducted by plaintiffs." *Id.* The court concluded by noting:

> The issues and parties in this case have been tailored to a narrower question: did U.S. corporations in their effort

> to secure their pipeline in Indonesia violate U.S. state tort law? Litigation and discovery on this issue, if conducted with care, should alleviate the State Department's concerns about interfering with Indonesia's sovereign prerogatives while providing a means for plaintiffs to obtain relief through their garden-variety tort claims. It should be feasible, for instance, for plaintiffs to perpetuate testimony and satisfy document discovery requirements outside Indonesia.

Id. at 29-30.

Exxon filed an interlocutory appeal, contending that the district court should have dismissed the plaintiffs' common law tort claims as non-justiciable political questions.

II.

Before we can consider the merits of Exxon's political question arguments, we must determine whether we have jurisdiction to hear this appeal. *See, e.g., Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 94-95 (1998) ("The requirement that jurisdiction be established as a threshold matter 'spring[s] from the nature and limits of the judicial power of the United States' and is 'inflexible and without exception.'") (quoting *Mansfield, C. & L.M.R. Co. v. Swan*, 111 U.S. 379, 382 (1884)). We hold that Exxon's appeal does not fall within the narrow "collateral order" doctrine, and thus it must be dismissed for want of jurisdiction.

A.

Our appellate jurisdiction is defined by statue as follows: "The courts of appeals (other than the United States Court of Appeals for the Federal Circuit) shall have jurisdiction of appeals from all final decisions of the district courts of the United States . . . except where a direct review may be had in the Supreme Court."[1] 28 U.S.C. § 1291. In general, a "final

[1] "There are a few types of interlocutory appeals that are expressly permitted by statute, none of which are applicable in the instant case. For

decision" is a district court order that "ends the litigation on the merits and leaves nothing for the court to do but execute the judgment." *Catlin v. United States*, 324 U.S. 229, 233 (1945). However, the Supreme Court has held that the phrase "final decision" also encompasses a "small class" of district court orders that do not necessarily conclude the litigation, but do "finally determine claims of right separable from, and collateral to, rights asserted in the action." *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541, 546 (1949). Such orders are "too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated." *Id.* Courts have subsequently identified three requirements for invocation of the "collateral order doctrine." In order to be immediately appealable, the order must: (1) "conclusively determine the disputed question"; (2) "resolve an important issue completely separate from the merits of the action"; and (3) "be effectively unreviewable on appeal from a final judgment." *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 468 (1978). *See also United States v. Philip Morris, Inc.*, 314 F.3d 612, 617 (D.C. Cir. 2003).

In applying this three-factor test, the Supreme Court has *repeatedly* emphasized the narrowness of the collateral order doctrine. As the Court stated in a recent decision, "we have not mentioned applying the collateral order doctrine recently without emphasizing its modest scope." *Will v. Hallock*, 126

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example, 28 U.S.C. § 1292(a) provides for interlocutory appeals from: (1) orders "granting, continuing, modifying, refusing or dissolving injunctions, or refusing to modify injunctions"; (2) orders appointing receivers or refusing to end a receivership; and (3) orders resolving certain issues in admiralty cases. Section 1292(b) permits circuit courts — in their discretion — to consider an interlocutory appeal when a district judge certifies that an order "involves a controlling question of law" and that "immediate appeal from the order may materially advance the ultimate termination of the litigation."

S. Ct. 952, 958 (2006). Moreover, the Court has expressly stated that:

> [T]he "narrow" exception *should stay that way* and never be allowed to swallow the general rule . . . that a party is entitled to a single appeal, to be deferred until final judgment has been entered, in which claims of district court error at any stage of the litigation may be ventilated.

Digital Equip. Corp. v. Desktop Direct, Inc., 511 U.S. 863, 868 (1994) (emphasis added). Clarity is also an important consideration in collateral order cases: "the issue of appealability under § 1291 is to be determined for the entire category to which a claim belongs, without regard to the chance that the litigation at hand might be speeded, or a 'particular injustic[e]' averted . . . by a prompt appellate court decision." *Id.* (internal citations omitted). The Court summarized its approach to the collateral order doctrine by noting that "we have meant what we said; although the Court has been asked many times to expand the 'small class' of collaterally appealable orders, we have instead kept it narrow and selective in its membership." *Will*, 126 S. Ct. at 958.

B.

The issue before us in the instant case is whether a district court's denial of a defendant's motion to dismiss on political question grounds is an immediately appealable collateral order.

At the outset, we note that the first two requirements for invocation of the collateral order doctrine are satisfied in this case. The district court "conclusively determine[d]" the political question issue by denying Exxon's motion to dismiss and allowing the litigation to proceed. *Exxon Mobil Corp.*, 393 F. Supp. 2d at 29. Nothing in the court's opinion suggests that its determinations were tentative or subject to revision. The political question issue is also "an important issue completely separate from the merits" of the plaintiffs' tort claims. In

Mitchell v. Forsyth, 472 U.S. 511, 527-28 (1985), the Supreme Court held that the defendant's claim of qualified immunity was "separate from the merits" of the plaintiff's suit for unlawful wiretapping. The Court noted that it could resolve the qualified immunity issue without considering "the correctness of the plaintiff's version of the facts, nor even determin[ing] whether the plaintiffs allegations actually state a claim." *Id.* at 528. The instant case is no different; the political question issue can be resolved without any consideration of the merits of the plaintiffs' common law tort claims.

Thus, we turn to the third requirement of the collateral order doctrine, which is whether the order in question will be "effectively unreviewable on appeal from final judgment." *Coopers & Lybrand*, 437 U.S. at 468. An order is "effectively unreviewable" after final judgment if it involves "an asserted right the legal and practical value of which would be destroyed if it were not vindicated before trial." *Midland Asphalt Corp v. United States*, 489 U.S. 794, 798 (1989) (quoting *United States v. MacDonald*, 435 U.S. 850, 860 (1978)). Many of the cases in which courts have found this requirement to be satisfied have involved a district court's denial of a claim of immunity or double jeopardy. Such cases satisfy the third requirement of the collateral order doctrine because they involve the rejection of a defense that would have allowed the defendant to *avoid trial altogether*. More specifically, the doctrines of qualified immunity and absolute immunity do not just protect covered individuals from judgments; they also provide protection from "the risks of trial—distraction of officials from their governmental duties, inhibition of discretionary action, and deterrence of able people from public service." *Mitchell*, 472 U.S. at 526 (quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 816 (1982)) (qualified immunity). *See also Nixon v. Fitzgerald*, 457 U.S. 731, 742 (1982) (absolute immunity); *United States v. Rostenkowski*, 59 F.3d 1291, 1297 (D.C. Cir. 1995) (Speech

and Debate Clause immunity and separation of powers immunity). Similarly, the Supreme Court has held that a district court's denial of a claim of state sovereign immunity is immediately appealable because the Eleventh Amendment grants non-consenting states a right to be free from trial: "The very object and purpose of the 11th Amendment were to prevent the indignity of subjecting a State to the coercive process of judicial tribunals at the instance of private parties." *P.R. Aqueduct & Sewer Auth. v. Metcalf & Eddy, Inc.*, 506 U.S. 139, 142-47 (1993) (quoting *In re Ayers*, 123 U.S. 443, 505 (1887)). Courts have also allowed immediate appeals from denials of double jeopardy claims because the Double Jeopardy Clause grants defendants a right to be *free from trial* if they have already been tried for the same offense. *See Abney v. United States*, 431 U.S. 651, 660-61 (1977) (noting that the Double Jeopardy Clause protects defendants against "the personal strain, public embarrassment, and expense of a criminal trial more than once for the same offense").

We do not mean to suggest that a claim of a "right to avoid trial" is inherently sufficient to meet the third requirement of the collateral order doctrine. If parties could take an immediate appeal every time they asserted a "right to avoid trial," this would "leave the final order requirement of § 1291 in tatters." *See Will*, 126 S. Ct. at 958. It would allow immediate appeal from all district court orders regarding personal jurisdiction, statutes of limitation, claim preclusion, the right to a speedy trial, and many other types of motions. *Id. See also Digital Equip. Corp.*, 511 U.S. at 873 (noting that "virtually every right that could be enforced appropriately by pretrial dismissal might loosely be described as conferring a 'right not to stand trial'"). Thus, the Supreme Court has *also* required that the "interest in avoiding trial" must be buttressed by "some particular value of a high order," such as "honoring the separation of powers, preserving the efficiency of government and the initiative of its officials, respecting a State's

dignitary interests, [or] mitigating the government's advantage over the individual." *Will*, 126 S. Ct. at 959.

Here, Exxon has not established that the political question doctrine confers a "right not to stand trial" that can justify an immediate appeal. Exxon asserts that interlocutory review of the district court's political question holding is necessary to protect the executive branch from judicial intrusion into sensitive foreign policy matters; it argues that any such intrusion will be effectively unreviewable on appeal from final judgment. In *Will*, the Supreme Court did identify "honoring the separation of powers" as a value that could support a party's interest in avoiding trial. *Id.* However, when the Court mentioned the separation of powers as a value that supported the "right to avoid the burdens of trial," it *only* did so while discussing cases involving immunity. *See id.* (quoting *Nixon*, 457 U.S. at 743, 749). As explained above, claims of immunity have long been held to fall within the collateral order doctrine. Thus, although *Will* did refer to the separation of powers as a "value of a high order," that case does not support the broad principle that all district court orders that reject separation of powers defenses are immediately appealable under the collateral order doctrine.

Moreover, this Court has expressly held that a party is not entitled to an appeal every time a district court denies a motion to dismiss based upon the separation of powers. In *United States v. Cisneros*, 169 F.3d 763, 764-66 (D.C. Cir. 1999), a former cabinet official—Henry Cisneros—was indicted for allegedly providing false information to the FBI during a background investigation. Cisneros moved to dismiss several counts of indictment on the grounds that "the separation of powers doctrine precludes the Judicial Branch from considering what information would be capable of influencing the President or the Senate in evaluating prospective cabinet officers." *Id.* at 766. The district court denied the motion to dismiss, holding that the prosecution of Cisneros

would not "impermissibly intrude[] upon the prerogatives of the executive and legislative branches to nominate and confirm prospective Cabinet members." *Id.* Cisneros immediately appealed the district court's decision, but this Court held that it did not have jurisdiction over the appeal under the collateral order doctrine. *Id.* at 767-71. Like Exxon in the instant case, Cisneros argued that he had a "right not to be tried" because the "very conduct of the trial itself will violate the separation of powers by causing the courts to invade the exclusive constitutional province of the coordinate branches." *Id.* at 769. This Court easily rejected Cisneros' argument:

> We do not doubt that Cisneros, like any criminal defendant, may raise separation of powers as a defense. . . . But it scarcely follows that whenever a defendant relies on the separation-of-powers doctrine, the defendant's right must be treated as if it rested on an "explicit . . . guarantee that trial will not occur." *Midland Asphalt Corp.*, 489 U.S. at 801. Most separation-of-powers claims are clearly not in that category.

Id. (internal citations omitted). This Court acknowledged that "a few" separation of powers claims may be immediately appealable, but it only specifically referred to claims based on immunity. *Id.* Given that Cisneros' separation of powers arguments were not based upon "an immunity from standing trial," this Court held that it did not have jurisdiction over the appeal under the collateral order doctrine. *Id.* at 769-70. Thus, in *Cisneros* this Court made clear that—outside the context of immunity—a defendant is not entitled to an appeal from a district court order denying a motion to dismiss based on the separation of powers.[2] Just so here. Simply invoking a

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[2] Although *Cisneros* was a "separation of powers" case, it is still highly relevant to the instant case because the political question doctrine is "primarily a function of the separation of powers." *Schneider v. Kissinger*, 412 F.3d 190, 193 (D.C. Cir. 2005) (quoting *Baker v. Carr*, 369 U.S. 186, 210 (1962)).

separation of powers defense does not permit Exxon to pursue an otherwise impermissible appeal.

Exxon has not directed us to—nor have we found—a single case in which a federal appeals court held that denial of a motion to dismiss on political question grounds is an immediately appealable collateral order. Exxon relies heavily upon *Rostenkowski* and *767 Third Avenue Associates v. Consulate General of Yugoslavia*, 218 F.3d 152 (2d Cir. 2000). Both of these cases are inapposite. In *Rostenkowski*, the defendant—a former Congressman—was indicted for misappropriation of congressional funds, and as a defense to his prosecution, he argued that he was protected by Speech and Debate Clause immunity and by general separation of powers immunity. *Rostenkowski*, 59 F.3d at 1294-97. The district court denied his claims of immunity, and Rostenkowski sought immediate appeal. This Court held that it had jurisdiction over the appeal under the collateral order doctrine. *Id.* at 1297. However, as discussed above, courts have long held that parties may immediately appeal from the denial of immunity claims, given that immunity confers a right to be free from the burden of litigation. *Rostenkowski* is simply a case that turns on the interlocutory appealability of immunity determinations; it does not support the broad principle that all political question determinations are immediately appealable. Exxon further argues that in Rostenkowski, this Court addressed the merits of a political question issue regarding the Rulemaking Clause, even though the district court denied Rostenkowski's motion to dismiss on these grounds. *See id.* at 1304-12. However, this Court did not in any way address the interaction between the collateral order doctrine and the political question doctrine. It is a well-established principle of interpretation that courts are "not bound by a prior exercise of jurisdiction in a case where it was not questioned and it was passed *sub silentio*." *United States v. L.A. Tucker Truck Lines, Inc.*, 344 U.S. 33, 38 (1952). *See also Pennhurst State Sch. & Hosp. v. Halderman*,

465 U.S. 89,119 (1984); *Hagans v. Lavine*, 415 U.S. 528, 533 n.5 (1974).

The Second Circuit's decision in *767 Third Avenue Associates* is also of no help to Exxon. In that case, the court held that an "abstention-based stay order" is a "final decision" under § 1291, and thus the plaintiffs may immediately appeal such an order. 218 F.3d at 159. The case does mention the political question doctrine, but only by noting that the district court's stay order was based upon political question concerns. *Id.* The only issue on appeal in *767 Third Avenue Associates* was whether it was proper for the district court to grant the stay. The case does not address whether a denial of a motion to dismiss based on political question grounds falls within the collateral order doctrine.

Finally, Exxon also argues that the political question issue will be effectively unreviewable after final judgment because during the course of this litigation, Exxon may be compelled to produce documents or information that are protected from disclosure under Indonesian law. Exxon contends that these disclosures may violate Indonesian law and subject the company and its officers to fines, imprisonment, and loss of business. *See* Appellant's Br. 22-23. However, in its discovery order of May 3, 2006, the district court stated that Exxon would be required to produce documents located in Indonesia only "after any necessary authorization" from the Indonesian government. In other words, during discovery Exxon will not be compelled to produce any documents against the wishes of the government of Indonesia. Thus, Exxon's concerns about being subjected to penalties for unauthorized disclosures are baseless.

In sum, we hold that we do not have jurisdiction over Exxon's appeal under the collateral order doctrine. Were we to allow defendants to appeal every time a district court denied a motion to dismiss based upon political question grounds, we would be substantially expanding the scope of

the collateral order doctrine. This would be directly contrary to the Supreme Court's statements that the doctrine is "narrow and selective" and "should never be allowed to swallow the general rule . . . that a party is entitled to a single appeal, to be deferred until final judgment." *See Will*, 126 S. Ct. at 957-58. We hold that the denial of a motion to dismiss based upon political question grounds is not an immediately appealable collateral order. Thus, Exxon's appeal must be dismissed for want of appellate jurisdiction.

III.

In the alternative, Exxon requests that we treat its appeal as a petition for a writ of mandamus. A writ of mandamus is available "to confine an inferior court to a lawful exercise of its prescribed jurisdiction or to compel it to exercise its authority when it is its duty to do so." *Mallard v. U.S. Dist. Court for the S. Dist. of Iowa*, 490 U.S. 296, 308 (1989) (quoting *Roche v. Evaporated Milk Ass'n*, 319 U.S. 21, 26 (1943)). Courts will issue the writ only if the petitioners' right to relief is "clear and indisputable" and if the petitioners "lack adequate alternative means to obtain the relief they seek." *Id.* at 309. *See also In re Sealed Case*, 141 F.3d 337, 339 (D.C. Cir. 1998). This Court has emphasized that "[m]andamus is an extraordinary remedy reserved for really extraordinary cases." *In re Bituminous Coal Operators Ass'n*, 949 F.2d 1165, 1167 (D.C. Cir. 1991) (quoting *Ex parte Fahey*, 332 U.S. 258, 260 (1947)). Moreover, it is well settled that mandamus "is not to be used as a substitute for appeal . . . even though hardship may result from delay and perhaps unnecessary trial." *Schlagenhauf v. Holder*, 379 U.S. 104, 110 (1964) (internal citations omitted). *See also In re GTE Serv. Corp.*, 762 F.2d 1024, 1026-27 (D.C. Cir. 1985). In order to grant Exxon's petition for mandamus, we would have to hold that the district court "clearly and indisputabl[y]" exceeded its jurisdiction by refusing to dismiss this case under the political question doctrine. We cannot so hold.

At the outset, we note that the district court has taken several steps to limit the scope of this litigation. For example, the court dismissed the plaintiffs' claims against a natural gas company that was partially owned by the Indonesian government because including this entity as a party would "create a significant risk of interfering in Indonesian affairs and thus U.S. foreign policy concerns." *Exxon Mobil Corp.*, 393 F. Supp. 2d at 28. Likewise, the district court has greatly curtailed discovery in this case; for example, Exxon will not be required to produce documents from its Indonesian operations unless it receives all "necessary authorizations" from the Indonesian government. The district court imposed this limitation to ensure that there would be no discovery of documents that the Indonesian government deems classified or confidential.

We disagree with Exxon's contention that there is a conflict between the views of the State Department and those of the district court. In a letter dated July 29, 2002, the Legal Adviser of the State Department noted that adjudication of the plaintiffs' claims would "risk a potentially serious adverse impact on significant interests of the United States." However, the letter also contained several important qualifications. It noted that the effects of this suit on U.S. foreign policy interests "cannot be determined with certainty." Moreover, the letter stated that its assessment of the litigation was "necessarily predictive and contingent on how the case might unfold in the course of litigation." Most importantly, the State Department emphasized that whether this case would adversely affect U.S. foreign policy depends upon "the nature, extent, and intrusiveness of discovery." We interpret the State Department's letter not as an unqualified opinion that this suit must be dismissed, but rather as a word of caution to the district court alerting it to the State Department's concerns. Indeed, the fact that the letter refers to "how the case might unfold in the course of the litigation" shows that the State Department did not necessarily expect the district court to

immediately dismiss the case in its entirety. Thus, we need not decide what level of deference would be owed to a letter from the State Department that *unambiguously* requests that the district court dismiss a case as a non-justiciable political question. *See Sosa v. Alvarez-Machain*, 542 U.S. 692, 733 n.21 (2004) (suggesting that when the State Department files a statement of interest "there is a strong argument that federal courts should give serious weight to the Executive Branch's view of the case's impact on foreign policy"). Of course, if we have misinterpreted this letter, or if the State Department has additional concerns about this litigation, it is free to file further letters or briefs with the district court expressing its views. *Cf. Republic of Austria v. Altmann*, 541 U.S. 677, 701 (2004) (noting that "nothing in our holding prevents the State Department from filing statements of interest suggesting that courts decline to exercise jurisdiction in particular cases implicating foreign sovereign immunity"). But given the letter before us in the record, we cannot say it is "indisputable" that the district court erroneously failed to dismiss the plaintiffs' claims under the political question doctrine, no matter what level of deference is owed to the State Department's letter.

We note that several other circuits have refused to invoke the political question doctrine to dismiss claims that were very similar to those in the instant case. For example, in *Sarei v. Rio Tinto, PLC*, 456 F.3d 1069 (9th Cir. 2006), the Ninth Circuit held that the political question doctrine does not bar litigation of a tort suit by Papua New Guinean villagers against an international mining company. In *Sarei*, the plaintiffs alleged that the mining company used the Papau New Guinean military to quell an uprising that threatened the mines; many civilians were killed or injured during this operation. *Id.* at 1075. The district court dismissed the case on political question grounds, but the Ninth Circuit reversed, holding that the suit did not present a non-justiciable political question. *Id.* at 1079-84. The court emphasized that this was simply a tort suit—which is constitutionally committed to the

judiciary—and that there was no reason to suspect that the suit would "infring[e] on the prerogatives" of the executive branch. *Id.* at 1079-82. In Sarei (like the instant case), the State Department filed a letter expressing concerns about the case, but the Ninth Circuit noted that this letter was "guarded," and held that "we are confident that proceeding does not express any disrespect for the executive, even if it would prefer that the suit disappear." *Id.* at 1082-83.

Similarly, in *Linder v. Portocarrero*, 963 F.2d 332 (11th Cir. 1992), the plaintiffs brought common law tort claims against several Nicaraguan individuals and groups, alleging that these defendants tortured and killed one of their relatives during the Nicaraguan civil war. The Eleventh Circuit held that the claims against "military and political" groups must be dismissed, but that the remaining claims—against private individuals—were not barred by the political question doctrine. *Id.* at 337. *See also Ungar v. Palestine Liberation Org.*, 402 F.3d 274, 279-82 (1st Cir. 2005) (holding that a tort suit by victims of terrorism against the PLO does not present a non-justiciable political question).

Although the aforementioned cases are not binding on this Court because they are from other circuits, they do demonstrate that Exxon has not established a "clear and indisputable" right to have the plaintiffs' claims dismissed as non-justiciable. Exxon cites no cases in which a federal court has held that, in a matter involving like issues and comparable circumstances (*i.e.*, claims by a private party against a private United States corporation), the complaint *must* be dismissed under the political question doctrine. And we are aware of no such authority.

In its brief, Exxon asserts that *Ex parte Republic of Peru*, 318 U.S. 578, 586-87 (1943), holds that mandamus is appropriate for cases that involve "the dignity and rights of a friendly sovereign state, claims against which are normally presented and settled in the course of the conduct of foreign

affairs by the President and by the Department of State." However, that case is inapposite for several reasons. First, in *Republic of Peru*, the district court had refused to dismiss an *in rem* claim against a Peruvian vessel even though the State Department and the government of Peru had reached a negotiated solution to this dispute. *Id.* at 799. The Supreme Court noted that:

> When the Secretary [of State] elects . . . to settle claims against the vessel by diplomatic negotiations between the two countries rather than by continued litigation in the courts, it is of public importance that the action of the political arm of the Government taken within its appropriate sphere be promptly recognized, and that the delay and inconvenience of a prolonged litigation be avoided by prompt termination of the proceedings in the district court.

Id. at 587. Thus, in *Republic of Peru*, continued litigation might have upset a negotiated settlement between the State Department and a foreign sovereign. In the instant case, however, there has been no settlement of the plaintiffs' claims by the political branches that would be disrupted by litigation in the district court. Moreover, the Supreme Court stated:

> That principle is that courts may not so exercise their jurisdiction, *by the seizure and detention of the property of a friendly sovereign*, as to embarrass the executive arm of the government in conducting foreign relations.

Id. at 588 (emphasis added). *Republic of Peru* was an *in rem* adjudication regarding a ship that was owned by a *foreign sovereign*. In contrast, the instant case involves only tort claims by private plaintiffs against a private corporation; the government of Indonesia is not a party to the suit, and none of its property would be affected by the district court's adjudication of this case. Thus, the *Republic of Peru* case provides little, if any, support for Exxon's contention that it is entitled to a writ of mandamus.

Exxon also relies upon *In re Austrian & German Holocaust Litigation*, 250 F.3d 156 (2d Cir. 2001), for the proposition that mandamus is appropriate "in a matter bearing on United States foreign policy" that presents "separation of powers concerns." This case also does little to support Exxon's position. In the *Holocaust Litigation* case, the district court had dismissed several Holocaust-related claims against Ger-man and Austrian defendants; however, the dismissal was contingent upon further actions being taken that would allow those claims to proceed in an international settlement process. *Id.* at 163-65. The Second Circuit issued a writ of mandamus and vacated two portions of the district court's order. First, the court held that:

> Paragraph 4(b) [of the district court's order] seemingly requires the German legislature to make a finding of legal peace and to do so before its summer recess. It would be beyond the authority of the court so to trammel on the prerogatives of a legislature in the United States. Much less does the court have the power to require such actions of the legislature of a foreign sovereign.

Id. at 164. Additionally, the court held that:

> The last sentence of paragraph 7 appears to indicate that if the German legislature failed to change German law, the district court could or would vacate these dismissals. It is not the office of the court, however, to decide what legislation should be enacted; and the refusal of a legislature, within the scope of its own authority, to enact or change a law is not a valid ground for vacatur of a final judgment.

Id. at 165. Thus, in the *Holocaust Litigation* case, the Second Circuit issued a writ of mandamus because the district court lacked authority "to dictate to legislatures what laws shall be passed." *Id.* This is a far cry from the order being challenged in the instant case, in which the district court allowed a common law tort suit to proceed against a private defendant.

In conclusion, although we need not resolve the political question issue on the merits at this time, we hold that Exxon has not established a "clear and indisputable" right to have the plaintiffs' claims dismissed. In so doing, we note that we have entered no holding inconsistent with our dissenting colleague's doctrinal views on deference owed the executive in matters of foreign policy. None of the cases cited by our colleague stand for the proposition that we should grant a mandamus for which the executive has not prayed. As we noted above, the State Department emphasized in its communications with the district court that "whether this case would adversely affect U.S. foreign policy depends upon 'the nature, extent, and intrusiveness of discovery." *See* page 16, *supra.* Since that correspondence the district court has dismissed some claims and limited discovery. Since that limitation, the State Department has made no further request of the district court, and has never requested the dismissal of the action against Exxon. The executive did not intervene to seek this mandamus, nor join the petition for mandamus filed by Exxon. Had the executive taken any of these measures, then the question raised by our dissenting colleague would have been before the district court. On the present record, however, the issue before us is whether Exxon is entitled to mandamus at this time. For the reasons set forth above, we are not able to say that Exxon has "clearly and indisputably" established a right to the relief it seeks. Accordingly, Exxon's petition for a writ of mandamus is denied.

IV.

We hold that Exxon's appeal does not fall within the narrow "collateral order" doctrine, and therefore, this appeal must be dismissed for want of jurisdiction. We also deny Exxon's request, in the alternative, for a writ of mandamus because Exxon has not established a "clear and indisputable" right to have these claims dismissed under the political question doctrine.

So ordered.

KAVANAUGH, *Circuit Judge*, dissenting: I respectfully dissent. In my judgment, allowing this lawsuit to proceed is inconsistent with bedrock principles of judicial restraint that the Supreme Court and this Court have articulated in cases touching on the foreign policy and foreign relations of the United States.

Citing the Alien Tort Statute and international law (and in some cases also state law and the Torture Victim Protection Act of 1991), foreign citizens have begun bringing human rights lawsuits against multinational corporations in U.S. courts. *See, e.g., Doe v. Unocal Corp.*, 963 F. Supp. 880, 883-84 (C.D. Cal. 1997) (considered to be first such case). The complaints often allege corporate complicity in various human rights violations committed by foreign government officials against foreign citizens in foreign countries (some cases allege direct corporate wrongdoing not involving foreign government officials). Particularly because many of these lawsuits directly or indirectly target actions of foreign government officials, they frequently raise sensitive foreign policy issues for the United States.

In this case, 11 Indonesian citizens sued Exxon; plaintiffs claim they were injured in Indonesia by members of the Indonesian military who provide security for Exxon in Indonesia. The Government of Indonesia has objected to the case as an intrusion on its sovereignty. And the Executive Branch has stated that the lawsuit will adversely affect the foreign policy interests of the United States—particularly U.S. relations with Indonesia, which is the largest Muslim nation in the world and has worked closely with the United States since September 11, 2001, in the ongoing war against al Qaeda and related radical Islamic terrorist organizations. In a lengthy letter, the State Department's Legal Adviser explained to the District Court how "adjudication of this lawsuit at this time would in fact risk a potentially serious adverse impact on significant interests of the United States, including interests related directly to the on-going struggle

against international terrorism." Under the precedents of the Supreme Court—including *Sosa v. Alvarez-Machain*, 542 U.S. 692, 733 n.21 (2004)—and decisions of this Court, the federal courts give deference to reasonable explanations by the Executive Branch that a civil lawsuit would adversely affect the foreign relations of the United States, and the courts dismiss such cases as non-justiciable political questions. Given those precedents and the State Department's reasonable explanation of how this litigation would harm U.S. interests, we should grant the petition for a writ of mandamus and order dismissal of plaintiffs' complaint.

I

Exxon Mobil Corporation's Indonesian subsidiary maintains a large natural gas facility in the Aceh Province of Indonesia. The Province has endured violence as a result of internal tensions between separatists in that region and the Government of Indonesia. To protect its Indonesian natural gas operations, Exxon entered into a contract with Indonesia's state-owned oil and gas company in which members of the Indonesian military would work as security personnel at Exxon's facility.

Plaintiffs in this case are Indonesian citizens who reside in the Aceh Province. They allege they were injured by Indonesian military personnel who worked for Exxon. In 2001, plaintiffs sued Exxon in the U.S. District Court for the District of Columbia to recover for those injuries. Plaintiffs brought claims against Exxon under the Alien Tort Statute and international law, the Torture Victim Protection Act, and state tort law. Plaintiffs asserted the same claims against PT Arun LNG Company, a natural gas entity that Exxon and the Indonesian government jointly own.

The fourth largest nation in the world (and the largest Muslim nation), Indonesia has been a key partner of the United States since September 11, 2001, in the ongoing war against al Qaeda and related radical Islamic terrorist organiza-

tions. This case—which alleges that Indonesian military personnel injured Indonesian citizens in Indonesia—has triggered serious objections from the Government of Indonesia about intrusion on its sovereignty. The State Department has carefully considered Indonesia's concerns and how the lawsuit might adversely affect U.S. interests. In 2002, the Legal Adviser for the State Department informed the District Court that "adjudication of this lawsuit at this time would in fact risk a potentially serious adverse impact on significant interests of the United States, including interests related directly to the on-going struggle against international terrorism." Deferred Appendix (D.A.) at 182. The State Department "anticipate[d] that adjudication of this case will be perceived in Indonesia as a U.S. court trying the GOI for its conduct of a civil war in Aceh." D.A. 183. In the Department's view, "[t]he Indonesian response to such perceived U.S. 'interference' in its internal affairs could impair cooperation with the U.S. across the full spectrum of diplomatic initiatives, including counterterrorism, military and police reform, and economic and judicial reform." D.A. 183-84. The State Department explained:

> This lawsuit could potentially disrupt the on-going and extensive United States efforts to secure Indonesia's cooperation in the fight against international terrorist activity. Indonesia is the fourth largest state in the world, with a population of some 210 million. It is also the largest Muslim nation, and serves as a focal point for U.S. initiatives in the ongoing war against Al Qaida and other dangerous terrorist organizations. U.S. counterterrorism initiatives could be imperiled in numerous ways if Indonesia and its officials curtailed cooperation in response to perceived disrespect for its sovereign interests.

D.A. 184. The State Department further stated that the litigation "may also diminish our ability to work with the Govern-

ment of Indonesia ('GOI') on a variety of important programs, including efforts to promote human rights in Indonesia." D.A. 182. The Department also noted that "[t]his litigation appears likely to further discourage foreign investment" in Indonesia, which "in turn, could have decidedly negative consequences for the Indonesian economy"; if a downturn in Indonesia's economy were to "breed instability it would adversely affect U.S. interests." D.A. 185. In addition, the Department stated that the suit could have a negative impact on U.S. diplomatic objectives throughout the region, on U.S. businesses, and on the international economy.

The State Department supported its statement with a letter sent by the Indonesian Ambassador to the Deputy Secretary of State: "As a matter of principle, we cannot accept the extra territorial jurisdiction of a United States Court over an allegation against an Indonesian government institution, . . . the Indonesian military, for operations taking place in Indonesia." D.A. 188.

In July 2005, the State Department's Legal Adviser reiterated the concerns first expressed in 2002, informing the District Court that "the concerns set forth in the State Department letter of July 2002 . . . remain valid today." D.A. 244. Along with the State Department's 2005 letter, the State Department also submitted a letter from the Indonesian Embassy reiterating the concerns the Government of Indonesia first expressed in 2002.

In October 2005, largely in response to the State Department's submissions, the District Court dismissed plaintiffs' federal-law claims against Exxon and dismissed all claims against PT Arun LNG Company. In dismissing the federal-law claims against Exxon, the District Court relied on the State Department's statement that "'adjudication of this lawsuit at this time would in fact risk a potentially serious adverse impact on significant interests of the United States, including interests related directly to the on-going struggle

against international terrorism.'" *Doe v. Exxon Mobil Corp.*, 393 F. Supp. 2d 20, 22 (D.D.C. 2005) (quoting State Department's 2002 Statement of Interest). The District Court reasoned that "determining whether defendants engaged in joint action with the Indonesian military necessarily would require judicial inquiry into precisely what the two parties agreed to do" and "such an inquiry cuts too close to adjudicating the actions of the Indonesian government." *Id.* at 27.

Although it dismissed the *federal*-law claims, the District Court did not dismiss plaintiffs' *state*-law tort claims against Exxon. The District Court stated that litigation and discovery on the state-law claims, "if conducted with care, should alleviate the State Department's concerns about interfering with Indonesia's sovereign prerogatives while providing a means for plaintiffs to obtain relief through their garden-variety tort claims." *Id.* at 30.

Exxon has filed an interlocutory appeal of the District Court's denial of Exxon's motion to dismiss the state-law tort claims. Exxon requests that we entertain its interlocutory appeal under the collateral order doctrine or, in the alternative, that we issue a writ of mandamus requiring dismissal of the state-law tort claims.

II

1. A civil lawsuit in a U.S. court involving a foreign government, foreign officials, or foreign interests may adversely affect relations between the United States and the foreign nation. Such cases therefore pose sensitive separation of powers issues for the Judiciary because the Constitution assigns the Executive and Legislative Branches primary authority over the foreign policy and foreign relations of the United States. *See, e.g., Regan v. Wald*, 468 U.S. 222, 242 (1984) ("Matters relating to the conduct of foreign relations . . . are so exclusively entrusted to the political branches of government as to be largely immune from judicial inquiry or

interference.") (internal quotation omitted); *Haig v. Agee*, 453 U.S. 280, 292 (1981) ("Matters intimately related to foreign policy and national security are rarely proper subjects for judicial intervention."); *Chicago & S. Air Lines v. Waterman S.S. Corp.*, 333 U.S. 103, 111 (1948) ("[T]he very nature of executive decisions as to foreign policy is political, not judicial. Such decisions are wholly confided by our Constitution to the political departments of the government, Executive and Legislative. . . . They are decisions of a kind for which the Judiciary has neither aptitude, facilities nor responsibility and have long been held to belong in the domain of political power not subject to judicial intrusion or inquiry."); *Oetjen v. Cent. Leather Co.*, 246 U.S. 297, 302 (1918) ("The conduct of the foreign relations of our Government is committed by the Constitution to the Executive and Legislative—'the political'—Departments of the Government, and the propriety of what may be done in the exercise of this political power is not subject to judicial inquiry or decision."); *see also Dep't of Navy v. Egan*, 484 U.S. 518, 529-30 (1988) ("As to these areas of Art. II duties the courts have traditionally shown the utmost deference to Presidential responsibilities.") (internal quotation omitted); *United States v. Curtiss-Wright Exp. Corp.*, 299 U.S. 304, 319 (1936) ("The President is the sole organ of the nation in its external relations, and its sole representative with foreign nations.") (internal quotation omitted).

As the courts therefore have recognized, lawsuits that would adversely affect the foreign policy of the United States can pose non-justiciable political questions. *See Baker v. Carr*, 369 U.S. 186, 211 (1962) (Regarding foreign policy issues: "Not only does resolution of such issues frequently turn on standards that defy judicial application, or involve the exercise of a discretion demonstrably committed to the executive or legislature; but many such questions uniquely demand single-voiced statement of the Government's views."); *Bancoult v. McNamara*, 445 F.3d 427, 435 (D.C. Cir. 2006) (describing "topics that serve as the quintessential sources of

political questions: national security and foreign relations"); *Hwang Geum Joo v. Japan*, 413 F.3d 45, 52 (D.C. Cir. 2005) ("The Executive's judgment that adjudication by a domestic court would be inimical to the foreign policy interests of the United States is compelling and renders this case nonjusticiable under the political question doctrine."); *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774, 803 (D.C. Cir. 1984) (Bork, J., concurring) ("Questions touching on the foreign relations of the United States make up what is likely the largest class of questions to which the political question doctrine has been applied.").

Courts are not well-equipped to determine on their own, however, whether a particular civil case would have a negative impact on U.S. foreign policy and should be dismissed. In part for that reason, as the Supreme Court has instructed, courts give deference to the Executive Branch when the Executive reasonably explains that adjudication of a particular civil lawsuit would adversely affect the foreign policy interests of the United States. *See, e.g., Sosa v. Alvarez-Machain*, 542 U.S. 692, 733 n.21 (2004) (regarding suits involving private parties: "[T]here is a strong argument that federal courts should give serious weight to the Executive Branch's view of the case's impact on foreign policy."); *Republic of Austria v. Altmann*, 541 U.S. 677, 702 (2004) ("[S]hould the State Department choose to express its opinion on the implications of exercising jurisdiction over *particular* petitioners in connection with *their* alleged conduct, that opinion might well be entitled to deference as the considered judgment of the Executive on a particular question of foreign policy.") (emphasis in original); *Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363, 366, 386 (2000) (regarding state legislation regulating foreign commerce with Burma: "[R]epeated representations by the Executive Branch supported by formal diplomatic protests and concrete disputes are more than sufficient to demonstrate that the state Act stands in the way of Congress's diplomatic objectives."); *cf. Am. Ins. Ass'n v.*

Garamendi, 539 U.S. 396, 424 (2003) (citing letters from State Department explaining harm to foreign policy caused by state law); *Regan*, 468 U.S. at 243 (referring to "the traditional deference to executive judgment" in foreign policy matters); *Ex parte Republic of Peru*, 318 U.S. 578, 588 (1943) (courts should not exercise their jurisdiction "as to embarrass the executive arm of the government in conducting foreign relations").

Deference to the Executive Branch's position on the foreign policy implications of a lawsuit traditionally has occurred in cases directly against foreign governments or foreign government officials. *See, e.g., Ex parte Peru*, 318 U.S. at 588; *Hwang Geum Joo*, 413 F.3d at 48; *Whiteman v. Dorotheum GmbH & Co. KG*, 431 F.3d 57, 59-60 (2d Cir. 2005) (citing *Altmann*, 541 U.S. at 702, and *Sosa* footnote 21 and deferring to State Department Statement of Interest in ordering dismissal of suit against Republic of Austria). Beginning in 1980, the category of cases potentially raising foreign policy concerns expanded as a result of the Second Circuit's decision in *Filartiga v Pena-Irala*, 630 F.2d 876 (2d Cir. 1980). That case held that, under the Alien Tort Statute, foreign citizens can sue foreign government officials for international law violations committed in foreign countries. *See id.* at 878, 887; *cf. Tel-Oren*, 726 F.2d at 775, 792 (Edwards, J., concurring); *id.* at 799, 812-16 (Bork, J., concurring); *id.* at 823 (Robb, J., concurring).

In recent years, foreign citizens have taken *Filartiga* a step further (and in some cases also cited the 1991 Torture Victim Protection Act) and begun to sue multinational corporations in U.S. courts—often alleging corporate complicity in human rights violations committed by foreign government officials against foreign citizens in foreign countries. *See generally* Beth Stephens, Sosa v. Alvarez-Machain: *"The Door Is Still Ajar" for Human Rights Litigation in U.S. Courts*, 70 BROOK. L. REV. 533, 537-38 (2005). Although those cases nominally

target corporations and not foreign government officials, federal courts have recognized that the suits still can adversely affect U.S. foreign policy interests. Several federal district courts therefore have applied traditional justiciability principles to this new category of cases against corporations, including deference to the Executive Branch as appropriate. *See, e.g., Corrie v. Caterpillar, Inc.*, 403 F. Supp. 2d 1019, 1032 (W.D. Wash. 2005) ("This case must also be dismissed because it interferes with the foreign policy of the United States of America. . . . For this court to preclude sales of Caterpillar products to Israel would be to make a foreign policy decision and to impinge directly upon the prerogatives of the executive branch of government."); *Mujica v. Occidental Petroleum Corp.*, 381 F. Supp. 2d 1164, 1194 (C.D. Cal. 2005) ("[T]he State Department has filed a Statement of Interest outlining several areas of foreign policy that would be negatively impacted by proceeding with the instant case. . . . [P]roceeding with the litigation would indicate a 'lack of respect' for the Executive's preferred approach of handling the Santo Domingo bombing and relations with Colombia in general."); *In re Nazi Era Cases Against German Defendants Litig.*, 334 F. Supp. 2d 690, 695-96 (D.N.J. 2004) ("[T]he political question doctrine counsels the Court to dismiss this action. . . . If this Court adjudicated the Complaint, it would do so against the recommendation of the Executive Branch."); *id.* at 695 ("[A]llowing private litigation of war-related claims would express a lack of respect for the executive branch.") (quoting *Iwanowa v. Ford Motor Co.*, 67 F. Supp. 2d 424, 486 (D.N.J. 1999)); *Iwanowa*, 67 F. Supp. 2d at 486 ("The executive branch has always taken the position that claims arising out of World War II must be resolved through government-to-government negotiations. Thus, allowing private litigation of war-related claims would express a lack of respect for the executive branch.").

In its 2004 decision in *Sosa*, the Supreme Court confirmed that traditional justiciability principles apply to the new cate-

gory of cases brought by foreign citizens against multinational corporations. The Court took note of the growing litigation against multinational corporations (and recognized the concerns about such litigation). Although the defendant in *Sosa* was a foreign official and not a corporation, the Supreme Court proactively suggested that, for purposes of applying standard justiciability principles, there is no distinction between (i) suits directly against foreign governments or officials and (ii) suits against non-governmental entities that nonetheless may affect U.S. relations with foreign governments. The Court outlined a "policy of case-specific deference to the political branches" to "several class actions seeking damages from various corporations." *Sosa*, 542 U.S. at 733 n.21. The Court stated: "[T]here is a strong argument that federal courts should give serious weight to the Executive Branch's view of the case's impact on foreign policy." *Id.* (citing *Altmann*, 541 U.S. at 701-02); *cf. Garamendi*, 539 U.S. at 415-16 ("The executive agreements at issue here do differ in one respect from those just mentioned insofar as they address claims associated with formerly belligerent states, but against corporations, not the foreign governments. But the distinction does not matter. Historically, wartime claims against even nominally private entities have become issues in international diplomacy . . . ."); *Crosby*, 530 U.S. at 386 (Court "acknowledged that the nuances of the foreign policy of the United States . . . are much more the province of the Executive Branch and Congress than of this Court" in litigation challenging state legislation regulating private corporations engaged in foreign commerce) (internal quotation omitted).

In the wake of *Sosa*, the lower federal courts properly give "serious weight" to Executive Branch statements of interest in human rights cases brought against multinational corporations. *See Sosa*, 542 U.S. at 733 n.21. Of course, serious weight does not mean conclusive weight. Judicial deference to the Executive Branch regarding the foreign policy implica-

tions of a civil lawsuit does not mean judicial abdication. It is not enough, therefore, for the Executive Branch merely to assert harm; rather, the harm must be explained—and explained reasonably. In other words, as in other cases involving Executive Branch statements about the adverse impact on U.S. foreign policy interests, the fundamental question for the Judiciary is whether the Executive Branch has reasonably explained that the litigation would adversely affect the foreign policy interests of the United States. *Cf. Hwang Geum Joo*, 413 F.3d at 48, 52.

This Court's decision in *Hwang Geum Joo* exemplifies proper application of those traditional justiciability principles. In that case, 15 women from China, Taiwan, South Korea, and the Philippines sued Japan under the Alien Tort Statute for international law violations. *Id.* at 46. The plaintiffs alleged that Japanese soldiers had subjected them to torture before and during World War II. *Id.* The plaintiffs and the Japanese government disagreed about whether peace treaties between Japan and plaintiffs' countries of origin extinguished war claims made against Japan by citizens of the plaintiffs' countries. *Id.* at 48. The State Department submitted a Statement of Interest stating "that judicial intrusion into the relations between Japan and other foreign governments would impinge upon the ability of the President to conduct the foreign relations of the United States." *Id.* In deciding the case, this Court "defer[red] to the judgment of the Executive Branch" as set forth in the Department's "thorough and persuasive Statement of Interest" and concluded that "our Constitution does not vest the authority to resolve that dispute in the courts." *Id.*

In another case involving the foreign policy interests of the United States, this Court also explained that "we grant substantial weight" to State Department statements regarding factual questions that are "at the heart of the Department's expertise." *In re Papandreou*, 139 F.3d 247, 252 & n.2 (D.C.

Cir. 1998). Such questions, we said, include State Department determinations about the extent to which U.S. interests are affected by "the sensitive diplomatic considerations involved" in certain legal claims. *Id.* at 252 (internal quotation omitted). In addressing the related "act of state" doctrine, this Court similarly has recognized "the value of obtaining views of the Executive Branch in matters relating to the application of the act of state doctrine and giving appropriate weight to those views." *Millen Indus., Inc. v. Coordination Council*, 855 F.2d 879, 881 (D.C. Cir. 1988).

All of the above precedents have established the following principle of law: When presented with a suit alleging wrongdoing committed in a foreign country, and particularly a suit implicating the actions of foreign government officials, federal courts should dismiss the complaint on justiciability grounds if the Executive Branch has reasonably explained that the suit would harm U.S. foreign policy interests.

2. Given those precedents and principles, the question in this case is whether the Executive Branch reasonably explained that this case would harm U.S. interests. I believe it clearly has done so.

In 2002 and then again in 2005, the State Department unambiguously stated to the District Court that, for multiple reasons, "adjudication of this lawsuit at this time would in fact risk a potentially serious adverse impact on significant interests of the United States, including interests related directly to the on-going struggle against international terrorism." D.A. 182. The State Department emphasized that Indonesia is "a focal point for U.S. initiatives in the ongoing war against Al Qaida and other dangerous terrorist organizations. U.S. counter-terrorism initiatives could be imperiled in numerous ways if Indonesia and its officials curtailed cooperation in response to perceived disrespect for its sovereign interests." D.A. 184. The Department explained that Indonesia would view this lawsuit as an intrusion on its sovereignty.

The Department stated that "[t]his lawsuit could potentially disrupt the on-going and extensive United States efforts to secure Indonesia's cooperation in the fight against international terrorist activity." D.A. 184. The Department identified and explained multiple other effects on foreign relations, including, for example: an adverse impact on human rights objectives; negative effects on foreign investment, which would have negative impacts on stability and economic conditions; and decreased opportunities for U.S. business abroad. Along with its 2002 statement, the State Department submitted to the District Court a letter from the Indonesian Ambassador that stated, "As a matter of principle, we cannot accept the extra territorial jurisdiction of a United States Court over an allegation against an Indonesian government institution, . . . the Indonesian military, for operations taking place in Indonesia." D.A. 188. Then in July 2005, the State Department provided a new letter stating that the concerns set forth in its initial letter "remain valid today." D.A. 244. Enclosed with that letter was another letter from the Indonesian government, reiterating the concerns Indonesia first expressed in 2002. Nothing in the record since 2005 purports to withdraw the concerns raised by either the State Department or the Government of Indonesia.

In light of the decisions of the Supreme Court (*Sosa* in particular), this Court's decisions (*Hwang Geum Joo* in particular), and the State Department's reasonable explanation of how this litigation would harm U.S. foreign policy interests, this case should be dismissed as a non-justiciable political question. (In reaching this conclusion, my point is that the State Department's explanation of harms in this case is clearly *sufficient* to require dismissal of this suit. I do not mean to imply, however, that all of the harms cited by the State Department in this case are *necessary* in order for courts to give deference to the Executive Branch. In other words, courts defer to the Executive Branch's reasonable explanation that a case would harm U.S. interests even if the harm is

something less than, for example, a negative impact on the war against al Qaeda.)

3. The District Court agreed with the above principles in dismissing the majority of plaintiffs' claims. In particular, the District Court relied on the State Department's statement that "'adjudication of this lawsuit at this time would in fact risk a potentially serious adverse impact on significant interests of the United States, including interests related directly to the on-going struggle against international terrorism.'" *Exxon Mobil Corp.*, 393 F. Supp. 2d at 22 (quoting State Department's 2002 Statement of Interest). The District Court also highlighted the Supreme Court's warning in *Sosa* that courts should be "'particularly wary of impinging on the discretion of the Legislative and Executive branches in managing foreign affairs,' particularly when the Executive has expressed its views about the litigation." *Id.* at 23 (quoting 542 U.S. at 727) (internal citation omitted). And the District Court proceeded to dismiss plaintiffs' *federal*-law claims in part because "determining whether defendants engaged in joint action with the Indonesian military necessarily would require judicial inquiry into precisely what the two parties agreed to do" and "such an inquiry cuts too close to adjudicating the actions of the Indonesian government." *Id.* at 27.

Having gone that far, however, the District Court allowed plaintiffs' *state*-law claims to move forward. I believe the same justiciability concerns that the District Court identified with respect to the *federal*-law claims also apply to the *state*-law claims. Regardless whether plaintiffs are attempting to establish Exxon's liability for state-law claims or federal-law claims, plaintiffs must prove that members of the Indonesian military engaged in acts of violence in Indonesia against Indonesian citizens. As a result, the District Court necessarily would be "adjudicating the actions of the Indonesian government" when it continues adjudication of plaintiffs' state-law claims, just as the District Court would have done had it

entertained plaintiffs' federal-law claims. Moreover, nothing in the State Department letter distinguished federal and state law claims in assessing the harm to U.S. foreign policy interests—indicating that the state-law claims pose just as much a threat to U.S. foreign policy interests as the federal-law claims. In sum, I respectfully submit that the District Court should have dismissed the state-law claims based on the same State Department concerns that supported the District Court's dismissal of the federal-law claims.

Because only state-law claims remain, plaintiffs' case also has a separate doctrinal problem—preemption. As the Supreme Court has stated, the possibility that state law (in this case, D.C. tort law) "will produce something more than incidental effect in conflict with express foreign policy of the National Government . . . require[s] preemption of the state law." *Garamendi*, 539 U.S. at 420. Although we need not resolve the issue here, the state-law tort claims are likely preempted as a result of the State Department's specific statement of harm to foreign policy. *See, e.g., id.* at 413, 424 (referencing Executive Branch statements regarding conflict caused by state law and stating: "There is, of course, no question that at some point an exercise of state power that touches on foreign relations must yield to the National Government's policy, given the concern for uniformity in this country's dealings with foreign nations that animated the Constitution's allocation of the foreign relations power to the National Government in the first place.") (internal quotation omitted); *cf. Geier v. Am. Honda Motor Co., Inc.*, 529 U.S. 861, 886 (2000) (holding that federal statute preempted state-law tort action); *see generally* Jack Goldsmith, *Statutory Foreign Affairs Preemption*, 2000 SUP. CT. REV. 175, 203-05, 213 (2000) ("[C]ourts should preempt state law only when the justification for preemption is fairly traceable to the foreign policy choices not of the federal courts, but rather of the federal political branches.").

4. For its part, the majority opinion says that the State Department has not "*unambiguously*" set forth its position on this lawsuit. The majority opinion seizes on footnote 1 of the State Department's 2002 Statement of Interest* and concludes that this footnote undermines the Department's statement that "adjudication of this lawsuit at this time would in fact risk a potentially serious adverse impact on significant interests of the United States, including interests related directly to the on-going struggle against international terrorism." *See* Maj. Op. at 16-17; D.A. 182. I respectfully think the majority opinion misreads the State Department footnote—and as a result gives unduly short shrift to the State Department's Statement of Interest.

In the same way that Executive agencies often do when justifying decisions necessarily based on predictive judgments, footnote 1 simply sets forth the factors on which the State Department based its judgment that *the litigation itself* would harm U.S. foreign policy interests. Footnote 1 does not purport to lay out a roadmap for the District Court to alleviate the State Department's concerns as the litigation unfolds—for example, by fashioning the scope of the litigation in a certain way. To be sure, the Department said its ultimate judgment regarding the effect of this suit was "predictive" and "contingent" on several factors. But that truism is not a hook for the

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* The State Department's footnote 1 states: "Much of this assessment is necessarily predictive and contingent on how the case might unfold in the course of litigation. E.g., the nature, extent, and intrusiveness of discovery; the degree to which the case might directly implicate matters of great sensitivity to the Government of Indonesia and call for judicial pronouncements on the official actions of the GOI with respect to the conduct of its military activities in Aceh; the effect that a decision in favor of plaintiffs might encourage secessionist activities in Aceh and elsewhere in Indonesia; whether the case were to go to a jury and, if so, whether a substantial monetary award were to be imposed on Exxon Mobil; how other large commercial interests might interpret such a judgment when making investment decisions in Indonesia." D.A. 183 n.1.

majority opinion to override the Department's bottom-line conclusion. After all, judgments of this kind are always predictive in the sense that the State Department can never know in advance precisely how future events will unfold and affect U.S. foreign policy.

The majority opinion does not grapple, moreover, with the illogic of this reading: Why would the State Department definitively say that "adjudication of this lawsuit at this time would in fact risk a potentially serious adverse impact on significant interests of the United States" if the Department intended only to say that the District Court should make certain changes to the scope of the lawsuit to alleviate possible foreign policy concerns? The majority opinion interprets the footnote to contradict the remainder of the Department's letter—which shows, I believe, that the majority opinion's interpretation of the footnote cannot be correct.

The key point here is that the State Department thoroughly explained its reasoning and firmly stated that this suit would harm relations with Indonesia and therefore negatively affect the U.S. war against al Qaeda, among several other adverse effects on significant U.S. interests. As support, the Department attached the Indonesian Ambassador's letter stating that "we cannot accept the extra territorial jurisdiction of a United States Court over an allegation against an Indonesian government institution." D.A. 188. In my judgment, under the precedents that guide our analysis in this area, there is no persuasive basis for disregarding the Executive Branch's statement that "adjudication of this lawsuit at this time would in fact risk a potentially serious adverse impact on significant interests of the United States, including interests related directly to the on-going struggle against international terrorism." D.A. 182. The majority opinion's rejection of the definitive and reasoned Executive Branch statement about this lawsuit's negative impact on America's prosecution of an ongoing war does not reflect the judicial restraint and defer-

ence that the Supreme Court and this Court have required in the sensitive area of foreign policy. *See* Maj . Op. at 16-17.

5. In analyzing the justiciability issue, the majority opinion seeks to buttress its conclusion by citing the decisions of "several other circuits" that purportedly "have refused to invoke the political question doctrine to dismiss claims that were very similar to those in the instant case." Maj. Op. at 17. Only one post-*Sosa* case cited by the majority opinion has addressed the political question doctrine in the context of a State Department Statement of Interest—the Ninth Circuit's divided decision in *Sarei v. Rio Tinto, PLC*, 456 F.3d 1069 (9th Cir. 2006). (In *Sarei*, residents of Papua New Guinea alleged corporate complicity in human rights violations committed by the Government of Papua New Guinea. *Id.* at 1073-75.)

The court in *Sarei* accepted the premise of the Supreme Court's statement in *Sosa* footnote 21—namely, that courts should defer to the Executive Branch's reasonable explanations of harm in cases against private entities. *See id.* at 1081. But the Ninth Circuit refused to defer to the particular State Department statement in that case. *Id.* at 1082-83. For purposes of our analysis, two points are important about *Sarei*: First, the State Department's Statement of Interest in *Sarei* was "guarded," so the Ninth Circuit's opinion is not particularly instructive to our decision here, in which the State Department's statement is strongly worded and clearly identifies a negative effect on, among other things, U.S. prosecution of an ongoing war. *Id.* at 1082. Second, in any event, I would not follow the Ninth Circuit's opinion in *Sarei* because I respectfully believe the decision is incorrect for reasons well stated by Judge Morrow in her thorough and persuasive District Court analysis in that case:

> Ruling on the merits of these allegations will inevitably require passing judgment on the pre-war and war-time conduct of the PNG government. It is this type of judg-

> ment that the Statement of Interest indicates may have serious implications for the future of the peace agreement that has been reached, and thus for the foreign policy objectives the executive branch has set. It is also the type of judgment that risks placing the court in the position of announcing a view that is contrary to that of a coordinate branch of government, with all the attendant embarrassment that would ensue. The situation is thus quintessentially one that calls for invocation of the political question doctrine as to each of plaintiffs' causes of action.

Sarei v. Rio Tinto, PLC, 221 F. Supp. 2d 1116, 1198-99 (C.D. Cal. 2002).

III

The final question here is whether this Court possesses the authority to entertain this interlocutory appeal. In my judgment, the standard for this Court to issue a writ of mandamus is plainly satisfied. To be sure, "[t]he remedy of mandamus is a drastic one, to be invoked only in extraordinary situations." *Kerr v. U.S. Dist. Court for N. Dist. of Cal.*, 426 U.S. 394, 402 (1976) (internal quotation omitted). A court will issue the writ "only upon a showing that the petitioner's right is 'clear and indisputable,' and that 'no other adequate means to attain the relief' exist." *In re Sealed Case*, 141 F.3d 337, 339 (D.C. Cir. 1998) (quoting *Gulfstream Aerospace Corp. v. Mayacamas Corp.*, 485 U.S. 271, 289 (1988) and *Allied Chem. Corp. v. Daiflon, Inc.*, 449 U.S. 33, 35 (1980)) (internal citation omitted).

The Supreme Court has made clear that mandamus is appropriate to prevent interference with foreign policy responsibilities that the Constitution has allocated to the Executive and Legislative Branches. In granting a writ of mandamus in *Ex parte Republic of Peru*, for example, the Supreme Court stated that cases intruding on the foreign policy re-

sponsibilities of the Executive Branch can be "of such public importance and exceptional character as to call for the exercise of our discretion to issue the writ." 318 U.S. 578, 586 (1943). In lawsuits involving the "dignity and rights of a friendly sovereign state," the Court noted, "it is of public importance that the action of the political arm of the Government taken within its appropriate sphere be promptly recognized, and that the delay and inconvenience of a prolonged litigation be avoided by prompt termination of the proceedings in the district court." *Id.* at 587.

The Supreme Court recently reiterated the principles of *Ex parte Peru*, indicating that mandamus is warranted when a lawsuit "would threaten the separation of powers by 'embarrass[ing] the executive arm of the Government.'" *Cheney v. U.S. Dist. Court for the Dist. of Columbia*, 542 U.S. 367, 380-81 (2004) (quoting *Ex parte Peru*, 318 U.S. at 588). The *Cheney* case re-affirmed that mandamus is proper "to prevent a lower court from interfering with a coequal branch's ability to discharge its constitutional responsibilities." *Id.* at 382; *see also In re Austrian & German Holocaust Litig.*, 250 F.3d 156, 163-65 (2d Cir. 2001) (in issuing writ of mandamus, court relies on political question doctrine and states that courts should not intrude on foreign policy prerogatives of political branches).

The majority opinion suggests that the mandamus principles articulated in *Ex parte Peru* and reiterated in *Cheney* are properly applied only in cases in which the property of a foreign government is at stake or a governmental entity is a party to a suit. *See* Maj. Op. at 18-19. I believe the majority opinion's attempt to distinguish *Ex parte Peru* is misplaced for two reasons — one factual and one legal.

First, as a factual matter, the foreign policy effect of plaintiffs' claims is not distinct from the effect of claims challenging the property or actions of a foreign government. Establishing liability against Exxon necessarily requires prov-

ing that members of the Indonesian military—acting pursuant to a contract entered into by the Indonesian Government—committed acts of violence against Indonesian citizens in Indonesia. Such proof is a necessary component of establishing either Exxon's vicarious liability for the alleged violent acts or Exxon's direct liability for negligently hiring the alleged bad actors. And the governmental nature of the allegations is why the Government of Indonesia has objected to this case (and why the Executive Branch is therefore concerned about it). *See* D.A. 183 (State Department's 2002 Statement of Interest: "All of the human rights abuses and injuries alleged in the complaint refer to conduct claimed to have been committed by the military and police forces of the GOI."). Therefore, I believe the majority opinion is incorrect to imply that this is somehow just a routine lawsuit involving allegations against a private corporation. *Cf. Sosa v. Alvarez-Machain*, 542 U.S. 692, 733 n.21 (2004); *Am. Ins. Ass'n v. Garamendi*, 539 U.S. 396, 424 (2003). Rather, this suit alleges wrongdoing by members of a foreign military who were supplied by a foreign state-owned entity to provide security at a facility offering vital infrastructural services for a foreign nation.

Second, apart from that factual hole in the majority opinion's distinction of *Ex parte Peru*, the key question for purposes of mandamus (as it is for assessing justiciability) is whether the Executive Branch has reasonably explained that the foreign policy interests of the United States would be adversely affected—not the identity of the named parties in the lawsuit. In *Ex parte Peru*, for example, the Supreme Court instructed that a district court should terminate litigation when that litigation adversely affects the foreign policy interests of the United States. *See* 318 U.S. at 586-87 ("The case involves the dignity and rights of a friendly sovereign state, claims against which are normally presented and settled in the course of the conduct of foreign affairs by the President and by the Department of State."). There is no logical or princi-

pled basis for granting mandamus in *some* cases that severely affect the foreign policy interests of the United States, but not in other cases, just because of the named defendants. *Cf. Sosa*, 542 U.S. at 733 n.21. The rule of *Ex parte Peru* is straightforward: If the District Court incorrectly green-lights a lawsuit that would adversely affect the foreign policy interests of the United States, mandamus is warranted.

Finally, the majority opinion also suggests that mandamus is not warranted because the District Court narrowed the litigation to protect U.S. interests. Maj. Op. at 15-16. But the U.S. foreign policy interest here is not simply in avoiding the effects of a final judgment, but is in avoiding the repercussions of *the litigation itself*. In cases (analogous for these purposes) involving foreign sovereign immunity, courts therefore have recognized that mandamus is an appropriate remedy when the litigation itself could harm the interests underlying sovereign immunity. *See, e.g., Ex parte Peru*, 318 U.S. at 587 ("[I]t is of public importance that the action of the political arm of the Government taken within its appropriate sphere be promptly recognized, and that the delay and inconvenience of a prolonged litigation be avoided by prompt termination of the proceedings in the district court."); *In re Papandreou*, 139 F.3d 247, 251 (D.C. Cir. 1998) (granting mandamus in case involving foreign sovereign immunity: "[S]overeign immunity is an immunity from trial and the attendant burdens of litigation, and not just a defense to liability on the merits.") (internal quotation omitted). The same rationale applies here.

IV

Although I disagree with the majority opinion's resolution of this case, there appears to be common ground about how litigation of the remaining state-law claims should proceed in the District Court. The State Department again will have an opportunity to express its views (previously expressed in 2002 and 2005) regarding this suit. If the State Department were to withdraw its previously stated opposition to the state-

law claims, then I would agree that the state-law claims would not be barred by the political question doctrine. *See First Nat'l City Bank v. Banco Nacional de Cuba*, 406 U.S. 759, 768 (1972) (plurality opinion of Rehnquist, J.) (suit against foreign government corporation may proceed because Executive Branch "has advised us" that suit would not "frustrate the conduct of this country's foreign relations"). On the other hand, I assume the majority would agree that the District Court should dismiss the case if the State Department reasonably and unambiguously states that litigation of the state-law claims would affect U.S. foreign policy interests. *See* Maj. Op. at 16-17. Indeed, even plaintiffs' counsel appeared to agree at oral argument that dismissal by the District Court (and, if not, then mandamus by this Court) would be warranted if the State Department reasonably explained to the District Court that the remainder of this case would negatively affect U.S. efforts in the war against al Qaeda. *See* Tr. of Oral Arg. at 23-24. Therefore, I expect that the District Court will obtain the State Department's specific views on the remaining state-law claims in the litigation and proceed accordingly.

* * *

In light of the precedents of the Supreme Court and this Court, and the State Department's reasonable explanation of how this lawsuit would harm U.S. interests, I would grant the petition for a writ of mandamus and order dismissal of the complaint as a non-justiciable political question. I respectfully dissent.

APPENDIX C

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

[Filed Oct. 14, 2005]

Civil Action No. 01-1357 (LFO)

JOHN DOE I, *et al.*,
Plaintiffs,

v.

EXXON MOBIL CORPORATION, *et al.*,
Defendants.

ORDER

For reasons explained in an accompanying memorandum, it is this 14th day of October, 2005, hereby

ORDERED: that defendants' motion to dismiss for failure to state a claim and lack of subject matter jurisdiction is hereby GRANTED as to Claims I (Alien Tort Claims Act), II (Torture Victim Protection Act), and III (Violence Against Women); and it is further

ORDERED: that defendants' motion to dismiss on justiciability grounds is hereby GRANTED IN PART as to defendant PT Arun LNG, Co.; and DENIED IN PART as to the remaining defendants and claims; and it is further

ORDERED: that defendants' motion to dismiss on forum non conveniens grounds is hereby DENIED; and it is further

ORDERED: that defendants' motion to dismiss for lack of personal jurisdiction is hereby DENIED; and it is further

ORDERED: that defendants' motion to dismiss on statute of limitations grounds is hereby DENIED without prejudice; and it is further

ORDERED: that plaintiffs shall show cause by October 27, 2005, why the claims of John Doe V should not be dismissed based on a violation of the applicable statute of limitations; and it is further

ORDERED: that plaintiffs shall show cause by October 27, 2005, why the complaint should not be dismissed for lack of subject matter jurisdiction over the remaining claims; a response from defendants may be filed on or before November 7, 2005; and it is further

ORDERED: that plaintiffs and defendants in their respective briefs address which law of a state or states of the United States should be applied to the remaining claims; and it is further

ORDERED: that the Status Conference scheduled for Wednesday, October 19, 2005, be continued until Wednesday, November 16, 2005, at 11:00 a.m. in Courtroom 3.

/s/ Louis F. Oberdorfer
UNITED STATES DISTRICT JUDGE

APPENDIX D

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

[Filed 10/14/2005]

Civil Action No. 01-1357 (LFO)

JOHN DOE I, *et al.*,
Plaintiffs,

v.

EXXON MOBIL CORPORATION, *et al.*,
Defendants.

MEMORANDUM

Pending is defendants' Motion to Dismiss the plaintiffs' complaint. Defendants seek dismissal on several grounds: (1) lack of subject matter jurisdiction and failure to state a claim on plaintiffs' Alien Tort Statute and Torture Victim Protection Act claims; (2) nonjusticiability; (3) forum non conveniens; (4) lack of personal jurisdiction over Exxon Mobil Oil Indonesia; and (5) statute of limitations on John Doe V's claims [docket no. 13].[1] For reasons explained below, defendants' motion to dismiss for failure to state a claim and lack of subject matter jurisdiction is granted with respect to plaintiffs' Alien Tort Statute and Torture Victim Protection Act claims. PT Arun LNG Company, an entity 55% owned by the Indonesian government, is also dismissed as a party to this suit on justiciability grounds. The only

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[1] Also pending is Plaintiffs' Motion to Lift Stay of Discovery [docket no. 83] and Defendants' Motion to File Surreply in Opposition to Plaintiff's Proposed Discovery Plan [docket no. 93].

remaining claims are plaintiffs' state law claims. None of the defendants' arguments for dismissal of these claims has merit.

Consequently, after entry of the Order accompanying this Memorandum, the unresolved issues are how to proceed with discovery and litigation on the state tort claims without interfering with U.S. foreign policy and Indonesia's sovereignty, and what basis exists for subject matter jurisdiction over plaintiffs' remaining state tort claims.

I. *Background and Procedural History*

This suit was filed in June 2001 by eleven Indonesian citizens[2] against defendants Exxon Mobil Corporation, Mobil Corporation, Mobil Oil Corporation, and Exxon Mobil Oil Indonesia Inc. (collectively, "Exxon"), and PT Arun LNG Company ("PT Arun"). Plaintiffs allege that defendants violated the Alien Tort Statute, the Torture Victim Protection Act ("Torture Act"), and committed various common-law torts in the course of protecting and securing defendants' liquid natural gas extraction pipeline and liquification facility in Arun, Indonesia.

The Alien Tort Statute in its entirety states "[t]he district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States." 28 U.S.C. § 1350. The Torture Act establishes federal jurisdiction and liability for "[a]n individual who, under actual or apparent authority, or color of law, of any foreign nation . . . subjects an individual to torture . . ." 28 U.S.C. § 1350 note § 2(a)(1)-(2).

Plaintiffs allege that, during an on-going conflict with the Indonesian government and Achenese rebels, defendants contracted with a unit of the Indonesian national army to provide security for the pipeline. Defendants allegedly conditioned

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[2] Plaintiffs filed under seal to protect their identities because of fear of reprisals.

payment on providing security, made decisions about where to build bases, hired mercenaries to train the security troops, and provided logistical support. Plaintiffs claim that Exxon and PT Arun are liable for the alleged actions of the Indonesian soldiers, as an aider and abettor, a joint action/joint venturer, or as a proximate cause of the alleged misconduct.

In October 2001 Defendants responded to the Complaint with a Motion to Dismiss. While that motion was under advisement, in response to my request on July 29, 2002 the U.S. State Department filed a Statement of Interest, and reiterated its position in a July 15, 2005 letter. In its Statement, the State Department maintained that it "believes that adjudication of this lawsuit at this time would in fact risk a potentially serious adverse impact on significant interests of the United States, including interests related directly to the on-going struggle against international terrorism." The State Department observed, however, that its assessment was "necessarily predictive and contingent" on how the case proceeded, including the intrusiveness of discovery and the extent to which the case required "*judicial pronouncements on the official actions of the [Government of Indonesia] with respect to its military activities in Aceh.*" (Emphasis added). The State Department included in its submission a letter from the Indonesian Ambassador to the United States. It stated that Indonesia "cannot accept the extra territorial jurisdiction of a United States court over an allegation against an Indonesian government institution, eq [sic] the Indonesia military, for operations taking place in Indonesia." The parties filed additional briefing on the implications of the State Department's submission.

Soon thereafter, a September 2002 order directed the parties to exchange interrogatories and requests for the preservation of documents. In 2003 the parties submitted extensive briefing regarding supplemental authority on Alien Tort Statute cases (particularly *Doe v. Unocal Corp.*, Civ. Nos. 00-

55603, 00-56628). In June 2004 the Supreme Court reached its decision in *Sosa v. Alvarez-Machain*, 542 U.S. 692, 124 S. Ct. 2739 (2004), which was highly relevant to this case.

In *Sosa* Enrique Camarena-Salazar, an agent of the U.S. Drug Enforcement Agency, was captured, tortured, interrogated, and eventually killed by suspected drug dealers while on assignment in Mexico in 1985. Dr. Humberto Alvarez-Machain, a Mexican physician, allegedly assisted in prolonging the agent's life during the torture and interrogation. In 1990 a federal grand jury in California indicted Alvarez for Camarena's murder. The United States unsuccessfully sought Mexican assistance in seizing Alvarez. Thereafter the DEA hired Mexican nationals, including petitioner Jose Francisco Sosa, to abduct Alvarez and bring him to El Paso, Texas. Sosa and the other Mexican nationals detained Alvarez overnight, then turned him over to U.S. authorities.

Alvarez was eventually acquitted, and subsequently sued Sosa, other Mexican citizens, the United States, and four DEA agents under *inter alia* the Alien Tort Statute. The trial court granted summary judgment in favor of Alvarez and awarded him $25,000. A three-judge Ninth Circuit panel affirmed. In a subsequent en banc proceeding upholding the panel's decision, the Ninth Circuit cited an alleged "clear and universally recognized norm prohibiting arbitrary arrest and detention." *Alvarez-Machain v. United States*, 331 F.3d 604, 620 (9th Cir. 2003) (en banc).

The Supreme Court reversed, ruling on factual grounds that a day-long detention was not a clear violation of international law. The Court also held that the field of international law violations cognizable under the Alien Tort Statute are limited to those cognizable when the statute was passed in 1789, and those that are "specific, universal, and obligatory," with the caveat that the door to additional claims "is still ajar subject to vigilant doorkeeping" by the courts. *Sosa*, 124 S. Ct. at 2766, 2773-74 (citation and internal quotations omitted).

The Court limited the reach of the statute in part due to the "collateral consequences" of interfering with U.S. foreign relations. It warned inferior courts to be "particularly wary of impinging on the discretion of the Legislative and Executive branches in managing foreign affairs" (*id.* at 2763), particularly when the Executive has expressed its views about the litigation. In such a case, the views of the Executive should be accorded "serious weight." *Id.* at 2766; *see also Joo v. Japan*, 314 F.3d 45, 52 (D.C. Cir. 2005) ("The Executive's judgment that adjudication by a domestic court would be inimical to the foreign policy interests of the United States is compelling and renders this case nonjusticiable under the political question doctrine.").

Thus, the proper degree of deference to the views of the Executive turns on the actual intrusiveness of the litigation; courts do not abdicate their Article III responsibilities on executive command. *See Marbury v. Madison*, 5 U.S. (Cranch) 137, 177 (1803). Accordingly, it is necessary to identify the specific intra-Indonesian actions, if any, necessary to support discovery and adjudication.

II. *Federal Statutory Claims*

A. Alien Tort Statute

Defendants allege that plaintiffs have failed to state a claim upon which relief may be granted under the Alien Tort Statute. That statute confers subject matter jurisdiction over "any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States." 28 U.S.C. § 1350. Plaintiffs are plainly aliens, who bring tort claims; the remaining issue is whether plaintiffs have adequately pled that defendants violated the law of nations.

Plaintiffs allege a host of potential violations, including genocide, torture, crimes against humanity, arbitrary detention (kidnaping), extrajudicial killing (including murder), and sexual violence. *See* Compl. ¶ 26. Defendants respond

that adjudication of these claims impermissibly interferes with Indonesia's sovereignty and U.S. foreign policy, and that plaintiffs fail to allege facts that would, if proved, fix liability on Exxon and PT Arun. In assessing whether plaintiffs have stated a claim under the Alien Tort Statute, courts must conduct a more searching merits-based inquiry than is required in a less sensitive arena. *See, e.g., Walsh v. Ford Motor Co.*, 588 F. Supp. 1513, 1519 (D.D.C. 1984) (citation omitted), *vacated on other grounds by* 807 F.2d 1000 (D.C. Cir. 1986).

In this light, defendants cannot be held liable for violations of international law on a theory that they aided and abetted the Indonesian military in committing these acts, largely for the reasons explained by the court in *In re South Af. Apartheid Litig.*, 346 F. Supp. 2d 538, 549-51 (S.D.N.Y. 2004). In that case, three groups of black South Africans sued several multinational corporations that had conducted business in South Africa during the apartheid years. Plaintiffs there alleged that defendants violated international law and were liable under the Alien Tort Statute. The trial court dismissed the complaint, and held that liability for "aiding and abetting" violations of international law was not itself actionable under the Alien Tort Statute. In reaching its conclusion, the court was "heedful of the admonition in *Sosa* that Congress should be deferred to with respect to innovative interpretations" of the Alien Tort Statute. *Id.* at 550. The court also was "mindful of the collateral consequences and possible foreign relations repercussions that would result from allowing courts in this country to hear civil suits for the aiding and abetting of violations of international norms across the globe." *Id.* at 551; *see also Central Bank of Denver v. First Interstate Bank of Denver*, 511 U.S. 164, 181-82 (concept of aiding and abetting in a civil context is "at best uncertain in application" and that, when Congress has not expressly provided for civil aider

and abetter liability, it will not be inferred), *superseded in part by statute in* 15 U.S.C. § 78t(e).[3]

Nor can plaintiffs maintain a claim for "sexual violence," because it is not sufficiently recognized under international law and is not a "specific, universal, and obligatory" norm (although claims of sexual violence may be cognizable elements of such illegal conduct as torture).

Defendants here also contend that plaintiffs have failed to exhaust local remedies on the remaining allegations, thereby precluding their Alien Tort Statute claims. *Sosa* indicated that exhaustion may be necessary "in an appropriate case," but it did not directly rule on the issue. 124 S. Ct. at 2766 n.21. Even assuming plaintiffs must exhaust local remedies, however, it is apparent here that efforts to pursue this case in Indonesia would be futile. *See Hammontree v. NLRB*, 925 F.2d 1486, 1517 (D.C. Cir. 1991) ("exhaustion is a prudential doctrine that should be applied flexibly and not when further pursuit of remedies is futile.") (citation omitted). Defendants submit an affidavit from Indonesian Supreme Court Justice Bismar Siregar stating that plaintiffs' claims could be litigated in Indonesia. Plaintiffs effectively counter that they risk the very real possibility of reprisals, including death, if they pursue their claims there. A substantial and serious threat of violence easily meets the futility standard. *See Rasoulzadeh v. Assoc. Press*, 574 F. Supp. 854, 861 (S.D.N.Y. 1983), *aff'd without op.* 767 F.2d 908 (2nd Cir. 1985).

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[3] Plaintiffs also seem to argue that defendants *attempted* to direct and control the Indonesian military. An attempt to commit a tort, however, is not actionable when no harm results. *See, e.g., Thomas v. Powell*, 247 F.3d 260, 264 (D.C. Cir. 2001) (holding that any tort "is predicated on a finding that the injury was proximately caused by the breach of duty") (citation and internal quotations omitted).

1. *Genocide and Crimes Against Humanity*

Genocide has been defined as "acts calculated to bring about the physical destruction, in whole or in part, of a national, ethnic, racial, or religious group." *Tel-Oren v. Libyan Arab Repub.*, 726 F.2d 774, 806 (D.C. Cir. 1984) (Bork, J., concurring) (citation omitted). Similarly, a systematic attack on certain segments of a population is a crime against humanity. *See Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 226 F.R.D. 456, 479-80 (S.D.N.Y. 2005) (citations omitted). Genocide and crimes against humanity are generally actionable under the Alien Tort Statute as international law violations. However, by definition these claims require adjudication on whether the Indonesian military was engaged in a plan allegedly to eliminate segments of the population; assessing whether Exxon is liable for these international law violations would be an impermissible intrusion in Indonesia's internal affairs. In *Doe v. Qi*, 349 F. Supp. 2d 1258 (N.D. Cal. 2004), the court declined to adjudicate claims of genocide and crimes against humanity when those claims required the court to evaluate the policy or practice of the foreign state. *See id.* at 1307-11. That precedent will be followed here.

2. *Torture, Arbitrary Detention, and Extrajudicial Killing*

In general, resolving claims of complicity in arbitrary detention, torture, and extrajudicial killing pose less of a threat of infringing Indonesia's sovereignty. These allegations are more targeted to actions by individuals, rather than a plan of mass killing or mayhem. They also conceivably violate the law of nations. *See Sosa*, 124 S. Ct. at 2768 (citing with approval the Restatement (Third) of Foreign Relations Law's conclusion that a "'state violates international law if, as a matter of state policy, it practices, encourages, or condones . . . prolonged arbitrary detention'") (citation omitted); *id.* at 2763 (holding that the Torture Act contains "a clear mandate . . . providing authority that 'establish[es] an unambiguous

and modern basis for' federal claims of torture and extrajudicial killing") (citation omitted); *see also Tel-Oren v. Libyan Arab Repub.*, 726 F.2d 774, 777 (D.C. Cir. 1984) (Edwards, J., concurring). However, as explained below, plaintiffs fail to plead these violations adequately.

a. *Color of Law*

Traditionally only states (and not persons) could be liable under the Alien Tort Statute for torture, arbitrary detention, or extrajudicial killing. *See Sanchez-Espinoza v. Reagan*, 770 F.2d 202, 206-07 (D.C. Cir. 1985). Recently, however, a few courts have held individuals liable for Alien Tort Statute violations when they acted under color of law. These courts have borrowed heavily from 42 U.S.C. § 1983 color of law jurisprudence. *See, e.g., Bigio v. Coca-Cola Co.*, 239 F.3d 440, 448 (2nd Cir. 2001). Reasoning in these cases is unpersuasive, however. Grafting § 1983 color of law analysis onto international law claims would be an end-run around the accepted principle that most violations of international law can be committed only by states.[4] *See Sanchez-Espinoza*, 770 F.2d at 706-07. Recognizing acts under color of law would dramatically expand the extraterritorial reach of the statute. Just as aider and abetter liability for international law violations has been rejected by some courts as overly expansive and beyond Congress' mandate (*see supra* Part II.A.), basing liability for Alien Tort Statute violations on color of law jurisprudence is a similar overreach.

The Supreme Court has recently admonished that "the determination whether a norm is sufficiently definite to support a cause of action should (and, indeed, inevitably must) in-

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[4] *See* Craig Forcese, Note: ATCA's Achilles Heel: Corporate Complicity, International Law and the Alien Tort Claims Act, 26 Yale J. Int'l L. 487, 498 (2001); *see also* Anita Ramasastry, STEFAN A. RIESENFELD SYMPOSIUM 2001: Corporate Complicity, 20 Berkeley J. Int'l L. 91, 146 (2002).

volve an element of judgment about the practical consequences of making that cause available to litigants in the federal courts." *Sosa*, 124 S. Ct. at 2766. Similarly, here the State Department warns of untoward consequences of endangering United States' relations with Indonesia.

Additionally, it is notoriously difficult to determine when a party has acted under color of law, making it harder for courts to engage in "vigilant doorkeeping." *See, e.g., Lebron v. Nat'l R.R. Passenger Corp.*, 513 U.S. 374, 378 (1995). It is also highly unfair to corporations operating in states with potentially problematic human rights records which under the color of law rule may (or may not) be subject to liability for doing business there and benefitting from the state's infrastructure. Indeed, the Supreme Court suggested that only states, and not corporations or individuals, may be liable for international law violations. *See Sosa*, 124 S. Ct. at 2766 n.20 ("A related consideration is whether international law extends the scope of liability for a violation of a given norm to the perpetrator being sued, if the defendant is a private actor such as a corporation or individual.").

Apart from the doctrinal flaw in applying color of law analysis, plaintiffs fail to allege adequately either of the two bases upon which color of law arguably can be based — joint action, and proximate cause.

i. Joint Action

Joint action requires an agreement or understanding to deprive a party of their constitutional rights. *See, e.g., Parker v. Grand Hyatt Hotel*, 124 F. Supp. 2d 79, 88 (D.D.C. 2000). Plaintiffs allege that Exxon and PT Arun worked with the military as joint actors in securing the pipeline, during which the military allegedly committed human rights abuses. As explained below, these allegations are insufficient to demonstrate that Exxon had an agreement or understanding jointly with the Indonesian military to violate plaintiffs' human rights.

In support of their argument, plaintiffs point to *Doe v. Unocal Corp.*, 110 F. Supp. 2d 1294 (C.D. Cal. 2000), *vacated without opinion by* 403 F.3d 708 (9th Cir. 2005) as involving a legal theory "essentially identical" to their own. In that case plaintiffs provided evidence that defendants hired the military for its oil exploration project, and the military used forced labor and committed other atrocities to complete an oil pipeline. Plaintiffs also provided evidence that defendants knew or should have known "that the military did commit, was committing, and would continue to commit these tortious acts." *Id.* at 1306. Even though Unocal and the military shared a common goal of a profitable project, the court found no joint action, because there was no evidence defendants "participated in or influenced" the military's unlawful conduct. *Id.* Similarly, in this case plaintiffs do not sufficiently allege that defendants participated in or influenced the military's actions that allegedly caused the human rights violations. *See Gallagher v. Neil Young Freedom Concert*, 49 F.3d 1442, 1453-56 (10th Cir. 1995) (holding that university officials did not engage in joint action to deprive concertgoers of their constitutional rights by conducting pay-down searches, when officials attended meeting at which promoter directed security company to conduct these searches).

Most important, determining whether defendants engaged in joint action with the Indonesian military necessarily would require judicial inquiry into precisely what the two parties agreed to do.[5] For reasons explained above, such an inquiry cuts too close to adjudicating the actions of the Indonesian government, and for that independent reason, should be avoided on justiciability grounds.

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[5] As counsel for plaintiffs conceded, in contrast to this case the State Department in the *Unocal* case stated that the litigation would *not* interfere with U.S.-Burmese relations. *See* Motion Hrng Tr. (Apr. 9, 2002), at 43.

ii. Proximate Cause

Another potential theory of liability is that defendants proximately caused the human rights violations, in this case by directing and controlling the military's actions. However, the proximate cause theory is inapplicable here, because it is not a proper basis for establishing "color of law." A determination of whether a party proximately caused an injury is quite distinct from whether it acted under color of law. Indeed, plaintiffs concede this point when they argue that the "issues of intent and causation [regarding proximate cause] are issues of liability distinct from the analysis of whether Exxon Mobil is a state actor." Pls' Opp. to Defs' Mot. to Dismiss, at 16; *see* Sheldon H. Mahmod, 1 *Civil Rights and Civil Liberties Litig.* § 2:4, at 2-14-15 (4th ed. 2003).

On a factual basis, plaintiffs do not sufficiently allege that defendants proximately caused human rights violations. The court in *Unocal* adopted the proximate cause analysis, but nonetheless found that defendants were not the proximate cause of the injuries because plaintiffs failed to "prove that private individuals exercised control over the government official's decisions." *Unocal*, 110 F. Supp. 2d at 1307. Largely for the reasons explained above (*see supra* Part II.A.2.a.i.), plaintiffs' allegations fall short of establishing proximate cause here, because defendants did not sufficiently allege that defendants controlled the Indonesian military's actions.[6]

B. Torture Victim Protection Act ("Torture Act")

The Torture Act creates liability for "[a]n individual" who subjects an individual to torture or extrajudicial killing. 28

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[6] In fact, at times the plaintiffs seem to argue that the Indonesian military was using the pipeline project as a mere *pretext* for committing abuses, which undermines any proximate cause claim. *See* Compl. ¶ 41 ("The Indonesian military used the pretense of providing 'security' for the Arun project to practice genocide on the people of Aceh").

U.S.C. § 1350 note § 2(a)(1)-(2). The parties disagree about the meaning of "individual." Plaintiffs argue that "individual" means a "person," which includes corporations. Defendants insist that the word "individual" has a precise meaning and is limited to human beings. On balance, the plain reading of the statute strongly suggests that it only covers human beings, and not corporations. *See Clinton v. New York*, 524 U.S. 417, 428-29 nn. 13-14 (1988) (holding that term "individual" meant "person" in the specific context of the line-item veto legislation, but noting that "Congress did not intend the result that the word 'individual' would dictate in other contexts," when "person" ordinarily had a broader meaning than "individual").

Even if "individual" could be construed to mean "corporation," plaintiffs face a larger problem. By the clear language of the Torture Act, a party must act "under actual or apparent authority, or color of law" to be liable under the statute. 28 U.S.C. § 1350 note § 2(a)(1)-(2). As explained above (*see supra* Part II.A.2.a.), defendants did not act under color of law. In addition, determining whether they acted under color of law impermissibly requires adjudication of another country's actions. *See Kadic v. Karadzic*, 70 F.3d 232, 245 (2d Cir. 1995) (legislative history of Torture Act confirms that plaintiff must establish government involvement in killing or torture to state a claim).

C. Violence Against Women

Plaintiffs also allege that defendants are liable for "Violence Against Women." *See* Compl. ¶ 73-76. However, these allegations seem to be largely a restatement of the claims under the Alien Tort Statute and Torture Act. *See id.* ¶ 75 ("The acts described herein are actionable under both the ATCA and the TVPA."). For the reasons enumerated above (*see supra* Part II.B-C), this claim is dismissed.

D. Lack of Subject Matter Jurisdiction

Defendants also move to dismiss based on lack of subject matter jurisdiction. The Alien Tort Statute itself only grants personal jurisdiction and does not create an independent cause of action. *See Sosa*, 124 S. Ct. at 2761. Because plaintiffs have failed to state a claim under the Alien Tort Statute, then there is no subject matter jurisdiction over the international law claims as well.

III. *State Law Tort Claims*

There remains for consideration the state law tort claims.

A. Justiciability

As previously noted, defendants argue that the complaint should be dismissed in its entirety as nonjusticiable. Proper concern for Indonesia's sovereignty requires the dismissal of PT Arun LNG Co., an entity that is 55% owned by Pertamina, Indonesia's state-owned oil and gas company. Adjudicating the liability of an entity owned by the Indonesian government would create a significant risk of interfering in Indonesian affairs and thus U.S. foreign policy concerns.[7]

Defendants' argument to dismiss the remaining state law tort claims on justiciability grounds is without merit. These claims are allowed to proceed, with the proviso that the parties are to tread cautiously. Discovery should be conducted in such a manner so as to avoid intrusion into Indonesian sovereignty. To this end, there will be firm control over any discovery conducted by plaintiffs.

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[7] Defendants also argue that the complaint should be dismissed on the Act of State doctrine. This doctrine is only implicated when "a court must decide – that is, when the outcome of a case turns upon – the effect of *official action* by a foreign sovereign." *W.S. Kirkpatrick & Co. v. Envtl. Tectonics Corp.*, 493 U.S. 400, 406 (1990) (emphasis added). With PT Arun dismissed as a party on justiciability grounds, the resolution of this case will not turn on any "official action" of the Indonesian government.

B. Forum Non Conveniens

Defendants move to dismiss this action in favor of litigation in Indonesia as the more convenient forum. Plaintiffs contend that litigating their claims in Indonesia would pose a serious risk to their safety, and that Indonesian courts would be biased. Plaintiffs plead that there is a genuine risk of reprisals if they publicly identify themselves by attempting to litigate in Indonesia. *See* Pls' Opp. to Defs' Mot. to Dismiss, at 40-42 (describing judicially noticeable[8] press reports about the disappearance of Jafar Siddiq Hamzah and other Indonesians investigating alleged human rights abuses). This recorded experience adequately supports plaintiffs' contention that prosecution of this suit in Indonesia would be futile. *See Rasoulzadeh v. Assoc. Press*, 574 F. Supp. 854, 861 (S.D.N.Y. 1983) (dismissing defendant's forum non conveniens motion when litigating plaintiffs' claims in Iran posed a significant risk to plaintiffs' safety), *aff'd without op.* 767 F.2d 908 (2nd Cir. 1985).

C. Personal Jurisdiction

Defendants contend that Exxon Mobil Oil Indonesia ("Exxon Indonesia") has not had sufficient contacts with the District of Columbia to support personal jurisdiction under D.C.'s long-arm statute. *See* D.C. Code § 12-423. Plaintiffs contend that jurisdiction exists in this forum because Exxon Indonesia is the alter ego of Exxon Mobil Corporation, which concededly is engaged in business with offices here. Plaintiffs have sufficiently pled facts that, if true, would support jurisdiction over Exxon Indonesia as an alter ego of Exxon Mobil. *See Shapiro, Lifschitz & Schram v. R.E. Hazard*, 90 F. Supp. 2d 15, 22 (D.D.C. 2000) ("Where affiliated parties are alter egos of a corporation over which the Court has personal jurisdiction. . . . the corporation's

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[8] *See* Fed. R. Evid. 201(b)(1) (a court may take judicial notice of a fact that is "generally known within the territorial jurisdiction of the trial court").

contacts may be attributed to the affiliated party for jurisdictional purposes.")

D. Statue of Limitations – John Doe V

Defendants further contend that the statute of limitations bars the claim of John Doe V because his allegations concern actions by the military in "1990." *See* Compl. ¶ 52. Plaintiffs do not respond to this argument. However, all other plaintiffs allege mistreatment in the years 2000 or 2001. *See* Compl. ¶¶ 48–51; 53–58. Defendant's motion to dismiss John Doe V's claims will be denied without prejudice, subject to plaintiffs' response to the Order to Show Cause why John Doe V's claims should not be dismissed.

IV. *Conclusion*

The issues and parties in this case have been tailored to a narrower question: did U.S. corporations in their effort to secure their pipeline in Indonesia violate U.S. state tort law? Litigation and discovery on this issue, if conducted with care, should alleviate the State Department's concerns about interfering with Indonesia's sovereign prerogatives while providing a means for plaintiffs to obtain relief through their garden-variety tort claims. It should be feasible, for instance, for plaintiffs to perpetuate testimony and satisfy document discovery requirements outside Indonesia. The details remain unresolved, but the parties are urged to propose discovery plans consistent with these suggestions.

Finally, plantiffs have not pled any independent basis for subject matter jurisdiction over these claims. *See* Compl. ¶ 4. Nor have they identified the state of the United States whose tort law should, in their view, apply. The accompanying Order directs plaintiffs to address these issues.

/s/ Louis F. Oberdorfer
UNITED STATES DISTRICT JUDGE

APPENDIX E

UNITED STATES DISTRICT COURT
FOR THE
DISTRICT OF COLUMBIA
WASHINGTON 20001

[Filed MAY 10, 2002]

CHAMBERS OF
LOUIS F. OBERDORFER
UNITED STATES DISTRICT JUDGE

May 10, 2002

The Honorable William H. Taft, IV
Office of the Legal Adviser
United States Department of State
2201 C Street, N.W.
Washington, DC 20520

RE: *Doe, et al. v. Exxon Mobil Corporation, et al.*, 01-CV-1357 (LFO)

Dear Mr. Taft:

The complaint (copy attached) filed in the above-entitled matter on behalf of a group of Indonesian citizens alleges that Exxon Mobil Corporation and various of its subsidiaries and affiliates ("Exxon") are legally responsible for human rights violations suffered by plaintiffs at the hands of an Indonesian Army unit engaged by Exxon to provide security for its Arun Project in Aceh, Indonesia.

The matter is before me on Exxon's motion to dismiss (copy attached), on the theory that the action is barred by the act of state and political question doctrines. Plaintiffs' opposition, defendants' reply, and a transcript of the hearing are also enclosed.

Out of an abundance of caution, in the tense times in which we are living, I inquire whether the Department of State has

an opinion (non-binding) as to whether adjudication of this case at this time would impact adversely on interests of the United States, and, if so, the nature and significance of that impact.

Justice delayed being justice denied, I and the parties would appreciate it if you could let us have your opinion before July 1, 2002.

Sincerely,
Louis F. Oberdorfer

Encl.

cc (w/o encl.):

Terrence Collingsworth, Esq.
Michael D. Hausfeld, Esq.
Martin J. Weinstein, Esq.
Paul W. Wright, Esq.

APPENDIX F

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 01-1357 (LFO)

JOHN DOE I, *et al.*,

Plaintiffs,

v.

EXXON MOBIL CORPORATION, *et al.*,

Defendants.

ORDER

For reasons explained in an accompanying memorandum, it is this 2nd day of March, 2006, hereby:

ORDERED: that Plaintiffs' Motion to Amend the Complaint [dkt no. 123] is GRANTED; and it is further

ORDERED: that Defendants' Motion for Leave to File Reply in Support of Application of Indonesian Law [dkt no. 134] is GRANTED; and it is further

ORDERED: that Defendants' Motion for Leave to File Surreply in Opposition to Plaintiffs' Motion to Amend Complaint [dkt no. 135] is GRANTED; and it is further

ORDERED: that, treating Defendants' Opposition to Plaintiffs' Motion to Amend the Complaint [dkt no. 125] as a Motion to Dismiss the Amended Complaint, the Motion is GRANTED IN PART as to plaintiffs' claim for negligent infliction of emotional distress, and DENIED IN PART as to plaintiffs' remaining claims; and it is further

NOTED: that this matter remains referred to Magistrate Judge Kay for possible resolution of discovery disputes.

/s/ [illegible]is F. Oberdorfer
[illegible]TED STATES DISTRICT JUDGE

APPENDIX G

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 01-1357 (LFO)

JOHN DOE I, *et al.*,

Plaintiffs,

v.

EXXON MOBIL CORPORATION, *et al.*,

Defendants.

MEMORANDUM

Currently pending in the above-captioned case is Plaintiffs' Motion to Amend the Complaint [dkt no. 123] and Defendants' Opposition to Plaintiffs' Motion to Amend the Complaint [dkt no. 125]. For the following reasons, plaintiffs' Motion to Amend is granted. Treating defendants' Opposition as a Motion to Dismiss, their Motion is granted in part with respect to plaintiffs' negligent infliction of emotional distress claims, and otherwise denied without prejudice.[1]

I. Subject Matter Jurisdiction

Plaintiffs have amended their Complaint to plead diversity jurisdiction pursuant to 28 U.S.C. § 1332(a)(2). Allegedly, plaintiffs are citizens of a foreign state (Indonesia), defendants are citizens of the United States, and the amount in controversy exceeds $75,000. *See* Am. Comp. ¶ 4. Defendants do not dispute these allegations. *See* Defs' Mot. for Leave to File Surreply in Opp. to Pltffs' Mot. to Amend

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[1] The factual allegations and procedural history of this case appear at *Doe v. Exxon Mobil Corp.*, 393 F. Supp. 2d 20 (D.D.C. 2005).

Compl. (3/1/06), at 2. Therefore, subject matter jurisdiction exists over plaintiffs' claims pursuant to 28 U.S.C. § 1332(a)(2) based on the diversity of the parties' citizenship.

II. Choice of Law

The parties have fully briefly the issue of what law should apply to plaintiffs' remaining state tort law claims. As explained below, the law of the forum – the District of Columbia – will apply to all tort law claims, except that Delaware law will apply to plaintiffs' wrongful death claim. It is assumed *arguendo* that Indonesian law differs from U.S. state tort law.

"To determine the applicable law in a diversity case, a federal court must follow the choice of law rules of the forum state." *Klaxon Co. v. Stentor Elec. Mgf. Co.*, 313 U.S. 487, 496 (1941). The District of Columbia uses a "governmental interests" analysis.

> Under this analysis, when the policy of one state would be advanced by application of its law, and that of another state would not be advanced by application of its law, a false conflict appears and the law of the interested state prevails. A true conflict arises when both states have an interest in applying their own laws to the facts of the case, in which case the law of the forum will be applied unless the foreign state has a greater interest in the controversy. In order to facilitate the governmental interests analysis, we consider four factors: a) the place where the injury occurred; b) the place where the conduct causing the injury occurred; c) the domicile, residence, nationality, place of incorporation and place of business of the parties; and d) the place where the relationship is centered.

Herbert v. D.C., 808 A.2d 776, 779 (D.C. 2002) (citations and internal quotation marks omitted). This test equally applies in balancing the interests of the United States in the

matter as against that of another nation. *See Tramontana v. Varig Airlines*, 350 F.2d 468, 471 (D.C. Cir. 1965).

The first question is whether Indonesian or U.S. state law governs.

Applying the *Herbert* analysis, the injury occurred in Indonesia. Some (perhaps most) of the conduct occurred in Indonesia, although plaintiffs argue that ExxonMobil knew about and participated in, indeed directed, from the United States the allegedly culpable conduct to the detriment of plaintiffs. The place of incorporation and place of business of all the defendants are in the United States, except that Indonesia is the principal place of business of Exxon Mobil Oil Indonesia, albeit a United States (Delaware) corporation. The relationship between it and plaintiffs is likely centered in Indonesia.

Although these factors tilt in favor of Indonesia, the United States has an overriding interest in applying its own laws to defendants, all of whom are U.S. companies. Indeed, this Court's October 14, 2005 opinion explained that the proper focus of this litigation is whether U.S. companies violated U.S. law by its conduct in protecting their pipeline in Indonesia. *See Doe*, 393 F. Supp. 2d at 29-30. Moreover, U.S. law provides for punitive damages, which are particularly appropriate to apply if the question is whether to sanction U.S. companies. Indonesian law does not authorize punitive damages. *See* Winarta Decl. ¶ 4 (12/9/05); Hornick Decl. ¶ 18 (2/3/06). Ultimately, the United States, the leader of the free world, has an overarching, vital interest in the safety, prosperity, and consequences of the behavior of its citizens, particularly its super-corporations conducting business in one or more foreign countries.

In sum, Indonesia's interest in applying its own law here is not as strong as the interest of the United States. *See De Aguilar v. Boeing Co.*, 47 F.3d 1404 (5th Cir. 1995) (Texas had greater interest in applying its own law when Mexican

plaintiffs sued Texas companies for Mexicana airliner crash in Mexico); *Friends for All Children, Inc. v. Lockheed Aircraft Corp.*, 587 F. Supp. 180, 191 (D.C. law applied when Vietnamese orphans injured in plane crash in Vietnam sued U.S. corporations; "[f]oreign jurisdictions have no interest in applying their law to damages issues if it would result in less protection to their nationals in a suit against a United States corporation.") (citations omitted). U.S. law would also be easier for this court to apply. *Cf. In re Korean Air Lines Disaster of Sept. 1, 1983*, 935 F. Supp. 10, 14 (D.D.C. 1996). Because the United States has a stronger interest (*see Herbert*, 808 A.2d at 779), U.S. law is the proper one to apply.

The next question is what U.S. state tort law to apply.

Based on the parties' submissions, the only conflict between D.C. law and the law of other states is regarding the wrongful death claim. At this point it appears that the actions of Exxon Mobil Oil Indonesia, a Delaware corporation, are the most relevant to this question. As a result, the law of Delaware will apply to the wrongful death claim. D.C. law, as the law of the forum, will otherwise apply.

III. Defendants' Motion to Dismiss

Defendants filed an Opposition to Plaintiffs' Motion to Amend the Complaint. Their sole objection is that amendment would be futile because plaintiffs have failed to state a claim. Accordingly, defendants' Motion will be treated as one to dismiss the complaint for failure to state a claim. Defendants' arguments are addressed below.

A. *The Foreign Affairs Doctrine*

Defendants move to dismiss the Complaint based on the foreign affairs doctrine. Under this doctrine, state laws are preempted when there is a conflict between the state law and the "exercise of the federal executive authority." *Am. Ins. Ass'n v. Garamendi*, 539 U.S. 396, 421 (2003). In *Gara-*

mendi, California's Holocaust Victim Insurance Relief Act of 1999 mandated disclosure by insurance companies of any policies issued in Europe between 1920 and 1945. The statute was designed to facilitate relief for families of Holocaust victims who were not compensated under their insurance policies. The federal government, meanwhile, was reaching a comprehensive agreement with Germany on how to settle Nazi-era insurance claims. The Court held that the California statute conflicted with the federal government's powers to regulate and manage foreign affairs. *Id.* at 420.

As plaintiffs note and *Garamendi* holds, this doctrine relates to the federal government's preemption over state governments when a case concerns areas of foreign affairs. The doctrine is compelled by respect for the constitutional grant of power to the executive branch – and not state governments – to control the United States' foreign relations with other countries. Here, in contrast, no state government has passed any statute in conflict with U.S. foreign policy. The *Garamendi* analysis is simply not applicable here, because there is no encroachments by any state on to the federal field of foreign affairs.[2] Accordingly, defendants' argument in this regard must be rejected.

B. *Failure to Allege Causation*

Defendants maintain that plaintiffs fail to allege that defendants controlled the actions of the Indonesian military; the Indonesian soldiers were not employees of defendants,

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[2] Defendants rely on *Mujica v. Occidental Petroleum Corp.*, 381 F. Supp. 2d 1164 (C.D. Cal. 2005) and *In re Assicurazioni Generali S.p.A. Holocaust Ins. Litig.*, 340 F. Supp. 2d 494 (S.D.N.Y. 2004) to press the point that the doctrine precludes state tort law claims as well. For the foregoing reasons, *Mujica* misconstrues and misapplies the foreign affairs doctrine. To the extent defendants are arguing that finding Exxon liable would interfere with U.S. foreign policy in general (as in *Assicurazioni*), this issue of course has already been decided, and is now the law of the case. *See Doe*, 393 F. Supp. 2d at 28-29.

and defendants are not liable for their conduct. Plaintiffs counter that D.C. law does not require a showing of control to establish liability under its theory of the case.

Plaintiffs are largely correct. Plaintiffs have alleged that defendants knew that the Indonesian soldiers had been committing human rights abuses, but nevertheless hired them to provide security for the pipeline. These allegations, if true, in general are sufficient to establish liab`ity based on the allegations that the soldiers acted as defendants' independent contractors and engaged in inherently dangerous activity. *See* Restatement (Second) of Torts § 411 (1965) ill. 1.

The general rule is that employers are not liable for the actions of their independent contractors. But several exceptions apply. *See Wilson v. Good Humor Corp.*, 757 F.2d 1293 (D.C. Cir. 1985). In *Wilson*, the D.C. Circuit (applying D.C. local law) held that the employer was liable because of the "inherently dangerous" exception to the no-liability rule. In that case, Good Humor before 1980 directly hired individuals to work as vendors, selling ice cream products from Good Humor trucks. During this time it undertook extensive safety training measures, recognizing that selling ice cream in an urban high-traffic environment could be potentially dangerous to its young customers. However, in 1980 it adopted a new employment model and sought to establish its vendors as independent contractors. Under this arrangement, "vendors 'purchased' their trucks from Good Humor, with the aid of Good Humor financing, and entered into a 'vendor's agreement' authorizing them to sell Good Humor products which they bought wholesale from Good Humor. The vendors could then sell ice cream at any price and at any location, they were not on the company payroll, and Good Humor did not supervise their day-to-day activities." *Id.* at 1296. Pursuant to its independent contractor plan, after 1980 Good Humor dropped its safety program, and otherwise did nothing to train its independent contractors on the safety risks involved.

On June 24, 1981, a girl was struck by a car as she was crossing the street and attempting to reach a Good Humor ice cream truck. The girl died, and her family brought suit against, *inter alia*, Good Humor. The district court entered a directed verdict in favor of Good Humor, on the theory that the evidence presented by the plaintiff did not establish the vicarious or direct liability of Good Humor for the actions of its vendors.

The court of appeals reversed. It recognized that as a general rule employers are not liable for the actions of its contractors, although there is an exception if independent contractors perform "inherently dangerous" work. *Id.* at 1303 (citations omitted). Work is inherently dangerous either if (1) it is "generically" hazardous, in that it is dangerous regardless of the skill level with which it is performed; or (2) it is dangerous in the particular circumstances in which it is to be performed. *Id.* "The applicability of the 'inherent danger' exception, then, depends not only on the generic nature of an independent contractor's work but also on the fact-specific, particular circumstances under which any task is to be performed." *Id.* at 1304. In sum,

> one who employs an independent contractor to do work involving a special danger to others which the employer knows or has reason to know to be inherent in or normal to the work, *or which he contemplates or has reason to contemplate when making the contract,* is subject to liability for physical harm caused to such others by the contractor's failure to take reasonable precautions against such danger.

Id. (quoting Restatement (Second) of Torts § 427 (1965)) (emphasis added by court). The appellate court concluded that Good Humor could be liable under this doctrine because it knew of the dangers to its customers of a curbside ice cream vendor service, but did nothing to alleviate or address this risk.

Defendants only cite this case in passing, and do not discuss its substantive holding. Nor do they rebut the idea that providing security in a country afflicted by civil war may be inherently dangerous.

Plaintiffs have adequately alleged that defendants knew or had to reason to know that paying the Indonesian military personnel to provide security for defendants' pipeline posed a danger to others as evidenced by the alleged history of human rights abuses by Indonesian soldiers. For that reason, except as stated below, defendants' motion to dismiss is denied.[3]

C. *Negligent Infliction of Emotional Distress*

Defendants contend that plaintiffs' claim of negligent infliction of emotional distress based on an underlying intentional tort cannot proceed. The case of *Brown v. Argenbright Sec., Inc.*, 782 A.2d 752 (D.C. 2001) controls this issue. In that case, a twelve-year-old girl, who was accused of shoplifting, alleged that she was sexually touched by a security guard at Safeway as he frisked her. The girl's mother filed suit on her behalf against Safeway and Argenbright, the security guard's employer; she did not sue the security guard. She brought claims for negligence, intentional infliction of emotional distress, and negligent infliction of emotional distress. The trial court dismissed the complaint, ruling that Safeway and Argenbright are not liable as a matter of law for the actions of the security guard. The court of appeals reversed as to Argenbirght only, holding that it was vicariously liable. However, it affirmed the trial court's dismissal of the

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[3] At the motion to dismiss stage, it is sufficient that there is one legal theory to support liability. This ruling is without prejudice to parties' right to plead at the summary judgment level that defendants are or are not liable under the inherent danger exception or other theories.

negligent infliction of emotional distress claim based on the security guard's alleged sexual misconduct. It held that

> damages for negligent infliction of emotional distress are recoverable only 'if the plaintiff was in the zone of physical danger and was caused by [the] defendant's negligence to fear for his or her own safety' . . . . [S]ince the conduct alleged, even when viewed in the light most favorable to appellant, is not negligence but an intentional tort, appellant cannot recover damages for negligent infliction of emotional distress based on that conduct.

Id. at 759 n.9 (citations omitted). In other words, the security guard's intentional act of sexually touching the girl cannot support a claim of negligent infliction of emotional distress.

Similarly, here plaintiffs claim negligent infliction of emotional distress against the employer-defendants, but the cause of the distress for these purposes was the intentional act of Indonesian soldiers. Defendants did not create the zone of danger or commit the act that directly caused plaintiffs emotional distress. Consistent with *Brown*, this claim must be dismissed.[4]

D. *Conversion*

Defendants also seek to dismiss the conversion claims raised by John Does II and V based on their homes being burned down on the theory that conversion under D.C. law concerns only the wrongful taking of personal – not real – property. *See, e.g., Duggan v. Keto*, 554 A.2d 1126, 1137 (1989) (citation and internal quotation marks omitted). Real property is "[l]and and anything growing on, attached to, or erected on it, excluding anything that may be severed without

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[4] To the extent that *Parker v. Grand Hyatt Hotel*, 124 F. Supp. 2d 79, 96-97 (D.D.C. 2000) is to the contrary, the D.C. Court of Appeals' holding in *Brown* is binding on this Court.

injury to the land." Black's Law Dictionary 1254 (8th ed. 2004).

Plaintiffs respond that, even under defendants' theory, conversion includes the personal property inside their homes. Moreover, plaintiffs argue that some other tort, like trespass, would cover destruction of plaintiffs' homes. Plaintiffs did not plead trespass, however. Nevertheless, defendants' motion to dismiss the conversion claims will be denied, because this claim arguably covers the property inside the plaintiffs' homes, which was allegedly destroyed or taken by the Indonesian soldiers. *See* Amen. Compl. ¶¶ 68; 71; 141-43.

E. *John Doe V*

Defendants argue that John Doe V did not sufficiently state a claim for battery, assault, or false arrest. Plaintiffs concede this point, noting that listing John Doe V as a victim of these to was a typographical error. Accordingly, plaintiffs have filed a corrected version of the amended Complaint. John Doe V's only claims are for conversion and intentional infliction of emotional distress.

IV. Conclusion

In an Order accompanying this memorandum, Plaintiffs' Motion to Amend the Complaint is granted. Defendants' Opposition to Plaintiffs' Motion to Amend the Complaint, to the extent it seeks dismissal of plaintiffs' Complaint, is denied, except that plaintiffs' claims for negligence infliction of emotional distress are dismissed.

/s/ Louis F. Oberdorfer
UNITED STATES DISTRICT JUDGE

Dated: March 2, 2006

APPENDIX H

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 01-1357 (LFO/AK)

JOHN DOE I, *et al.*,

Plaintiffs,

v.

EXXON MOBIL CORPORATION, EXXON MOBIL OIL INDONESIA, INC., MOBIL CORPORATION, and MOBIL OIL CORPORATION,

Defendants.

MEMORANDUM ORDER

This matter was referred to the undersigned for consideration of the parties' "joint submission . . . detailing Plaintiffs' proposed discovery plan (excluding depositions) and Defendants' objections, if any, thereto; . . .[,] " pursuant to the trial court's December 21, 2005 Order docketed at [120]. *See id.* at 2. The trial court further directed that the parties were to "consult with [the undersigned] . . . to resolve any areas of disagreement regarding discovery . . . ." *Id.*

On February 23, 2006, the parties filed their Joint Submission Regarding Formulation of Discovery Plan ("Joint Submission") [131], which indicated that because "the Parties were unable to reach agreement on a discovery plan; therefore the Parties have set forth [herein] (I) Plaintiffs' proposed discovery plan and (II) Defendants' proposed discovery plan." *See* [131] at 1. On February 28, 2006, the Defendants filed a Brief in Support of their Proposed Discovery Plan and Objections to Plaintiffs' Proposed Plan [133]. The Court held a status hearing on March 1, 2006, to discuss the

two proposed plans, which were both taken under advisement.

Background

Plaintiffs filed their Complaint [3] on June 19, 2001, alleging, *inter alia*, federal and state law tort claims for negligent hiring and supervision, assault and battery, and other intentional torts, resulting in injuries to Plaintiffs, their family members and their property, allegedly suffered at the hands of security forces working for Defendants.[1] On October 1, 2001, Defendants filed a motion to dismiss [13] the Complaint, which resulted in the trial court dismissing Plaintiffs' federal claims and ordering Plaintiffs to justify their asserted basis for jurisdiction over the state law tort claims. On November 22, 2005, Plaintiffs filed a Response [110] to the trial court's Order, alleging diversity jurisdiction and Plaintiffs also stated their intent to seek leave to amend the Complaint, to add such allegations. The Court ordered that Plaintiffs file their Motion for Leave to Amend the Complaint and the Amended Complaint by January 13, 2006, which was subsequently enlarged to January 20, 2006. *See* December 21, 2005 Order [120]. Plaintiffs sought leave to amend the Complaint, and in response thereto, Defendants filed an opposition, which was treated by the trial court as a motion to dismiss the amended complaint.

On March 2, 2006, the trial court entered an Order [136] granting Plaintiffs' Motion for Leave to Amend the Complaint [123] to plead diversity jurisdiction. The trial court also granted in part and denied in part Defendants' Opposition to the Motion for Leave to Amend [125], treating such Opposition as a motion to dismiss the amended complaint, which resulted in the dismissal of Plaintiffs' claim for negligent

[1] The factual allegations and procedural history of this case are set forth in more detail in *Doe v. Exxon Mobil Corp.*, 393 F. Supp.2d 20 (D.D.C. 2005).

infliction of emotional distress, and left standing the balance of Plaintiffs' claims. The trial court noted that the referral to the undersigned for "possible resolution of discovery disputes" remains intact. *See* [136] at 2.

In its Memorandum Opinion [137], accompanying the Order [136], and addressing the Defendants' motion to dismiss, the trial court held that "the law of the forum – the District of Columbia – will apply to all tort law claims, except that Delaware law will apply to plaintiffs' wrongful death claim." [137] at 2. The trial court rejected the Defendants' argument that the Complaint should be dismissed on grounds of the foreign affairs doctrine. The trial court also ruled that Plaintiffs "have adequately alleged that defendants knew or had reason to know that paying the Indonesian military personnel to provide security for defendants' pipeline posed a danger to others as evidenced by the alleged history of human rights abuses by Indonesian soldiers." *See* [137] at 8.[2]

Discussion of Discovery Plans

At the status hearing to address the competing discovery plans proposed by Plaintiffs and Defendants, the Defendants asserted that all discovery should be stayed until the trial court rules on Plaintiffs' motion for leave to amend the Complaint, and Defendants have answered such amended complaint. In light of the trial court's Order [136] relating to the Amended Complaint, Defendants' assertion is partially moot. The Court left intact the majority of the Plaintiffs' claims in its proposed Amended Complaint and Defendants are now obligated to respond to the Amended Complaint in accordance with the Federal Rules of Civil Procedure.

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[2] Notably, the Court made this ruling "without prejudice to [the] parties' right to plead at the summary judgment level that defendants are or are not liable under the inherent danger exception or other theories." [137] at 8, n.3.

Defendants propose that the exchange of initial disclosures relating to "personal jurisdiction over Defendant ExxonMobil Oil Indonesia, Inc. ("EMOI") and . . . [the] degree [to which] the non-EMOI defendants were aware of, and involved in, EMOI's activities[,]" excluding from such discovery "documents and information physically residing in Indonesia" be made within 20 days after filing and service of Defendants' Answer. Joint Submission at 3. Defendants further propose that the parties exchange document requests and interrogatories within 30 days after the initial disclosures.

In contrast, Plaintiffs propose a March 10, 2006 deadline for initial disclosures, with ongoing supplementation pursuant to Fed. R. Civ. P.23(e). Plaintiffs also wish to serve their requests for the production of documents related to personal jurisdiction and receive Defendants' equivalent requests immediately, with answers or objections to such requests due one week later. This Court proposes a balance between the two positions, with the result that the parties' initial disclosures will be due within ten days after the filing of Defendants' Answers and would be confined to the subject matter noted by Defendants and exclude documents physically located Indonesia. The parties will exchange document requests and interrogatories relating to personal jurisdiction within 15 days thereafter, with documents, answers and/or objections thereto to be filed 20 days thereafter. This schedule is subject to mutual modification.

Both parties suggest a deadline of March 10, 2006 for submission of a joint proposed protective order, anticipating continuation of meet and confer sessions, as necessary. In light of the timing of this Memorandum Order, the Court proposes a deadline of March 17, 2006 for the submission of a joint proposed protective order. Plaintiffs propose that any motion to compel filed by either party shall be governed by the time schedule set forth in the Federal Rules of Civil

Procedure and Local Civil Rules of this Court.[3] Plaintiffs also propose a close of discovery deadline of September 1, 2006. This Court suggests that, in light of the parties' inability to agree on the scope of discovery in this case, and the contentious nature of the claims in this case, it is premature to set a discovery deadline. Accordingly, it is this 6th day of March, 2006,

ORDERED that the Discovery Plan attached hereto as Exhibit A be and hereby is adopted by the Court.

/s/ ALAN KAY
UNITED STATES DISTRICT COURT

[3] Plaintiffs also propose that documents whose production is compelled shall be produced within 15 days of the ruling on the motion to compel, but the Court suggests that the ruling on the motion to compel set forth any deadline for compliance.

EXHIBIT A

Discovery Plan

Defendants' Answers to Plaintiffs' Amended Complaint

Due 30 days after filing and service of Amended Com plaint

Parties exchange Initial Disclosures (confined to subject matter noted in accompanying Memorandum Order, and excluding documents located in Indonesia)

Due 10 days after filing of Answers

Parties exchange Document Requests and Interrogatories relating to personal jurisdiction

Due 15 days after service of Initial Disclosures

Parties respond to Document Requests and Interrogatories

Due 20 days after service of Document Requests and Interrogatories

Submission of a Joint Proposed Protective Order

March 17, 2006

Motions to Compel

Time of filing governed by the Federal Rules of Civil Procedure and Local Civil Rules

The trial court's rulings on any motions to compel shall indicate the deadline for compliance therewith.

The dates set forth herein are subject to mutually agreed-upon modification.

A close of discovery deadline will be set at a later date.

APPENDIX I

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 01-1357 (LFO)

JOHN DOE I, *et al.*,

Plaintiffs,

v.

EXXON MOBIL CORPORATION, *et al.*,

Defendants.

ORDER

For the reasons stated in an accompanying Memorandum, it is this 3rd day of May, 2006, hereby:

ORDERED: that Plaintiffs' Motion for Clarification or, in the Alternative, for Reconsideration of the Discovery Plan [dkt nos. 142, 143] is DENIED IN PART and GRANTED IN PART, as explained below; and it is further

ORDERED: that plaintiffs and defendants Exxon Mobil Corporation, Mobil Corporation, and Mobil Oil Corporation (the "U.S. Exxon defendants") shall exchange initial disclosures pursuant to Fed. R. Civ. P. 26 on or before May 12, 2006; and it is further

ORDERED: that plaintiffs and U.S. Exxon defendants shall exchange document requests and interrogatories related to the acts or omissions in the United States by the U.S. Exxon defendants which may be a proximate cause of plaintiffs' alleged injuries, or regarding knowledge on the part of U.S. Exxon defendants of tortious conduct by any defendant in Indonesia, on or before May 25, 2006; and it is further

ORDERED: that plaintiffs and U.S. Exxon defendants shall respond to the above-referenced document requests and interrogatories on or before June 20, 2006; and it is further

ORDERED: that defendants (including Exxon Mobil Oil Indonesia) shall produce any and all documents in Indonesia or in the possession of Exxon Mobil Oil Indonesia that defendants reasonably anticipate they will likely use in their defense (after any necessary authorization by BPMIGAS and MIGAS) on or before June 27, 2006; and it is further

ORDERED: that discovery disputes, including entry of any Protective Order, remain referred to Magistrate Judge Kay for consultation and resolution; and it is further

ORDERED: that any document subject to discovery located outside Indonesia must be produced even if a counterpart or copy is also located in Indonesia; and it is further

ORDERED: that no party shall relocate any document to Indonesia or any other location to avoid discovery in this matter, or otherwise act in any way to obstruct, impede, delay, or avoid discovery; and it is further

ORDERED: that Magistrate Kay's March 6, 2006 Order remains in effect to the extent it is not inconsistent with this Order.

/s/ Louis F. Oberdorfer
UNITED STATES DISTRICT JUDGE

APPENDIX J

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 01-1357 (LFO)

JOHN DOE I, *et al.*,

Plaintiffs,

v.

EXXON MOBIL CORPORATION, *et al.*,

Defendants.

MEMORANDUM

A December 21, 2005 Order referred discovery disputes in the above-captioned case to Magistrate Judge Kay. On March 6, 2006, after conferring with the parties, Magistrate Kay issued a Discovery Order. On March 16, 2006, plaintiffs filed a motion for clarification or reconsideration of Magistrate Kay's Order. This motion was directed to Magistrate Kay, but is properly before this Court.[1] On May 1, 2006, the parties argued the merits of the motion in court, and also responded to a proposed Discovery Order that modified Magistrate Kay's March 6, 2006 Order. The proposed Order contemplated limited discovery on personal jurisdiction over Exxon Mobil Oil Indonesia, and more general discovery as to the remaining defendants.

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[1] Local Civ. R. 72.2(b) provides: "Any party may request the [district] judge to reconsider a magistrate judge's ruling . . . by filing a motion to reconsider within 10 days after being served with the order of the magistrate judge, unless a different time is prescribed by the magistrate judge or the judge."

At oral argument, defendants stressed the need to tread carefully in light of the concerns of the U.S. State Department and the Indonesian government regarding discovery in this case. On July 29, 2002, the State Department maintained that it had concerns regarding the litigation, including the "nature, extent, and intrusiveness of discovery[.]" On July 15, 2005, the State Department responded to plaintiffs' proposed discovery plan by stating that it "triggers the concerns set forth in the State Department letter of July 2002, which remain valid today." The proposed Order avoided discovery in Indonesia, except that it required defendants to produce any documents they intend to use in their defense. In that light, the proposed Order does not implicate the concerns of the U.S. State Department or Indonesian government. Defense counsel acknowledged at oral argument that discovery limited to personal jurisdiction over EMOI and the non-EMOI defendants' knowledge of and participation in allegedly tortious conduct in Indonesia in the first phase was consistent with these two governments' objections. *See* Hearing Tr. (5/1/06), at 14-15 ("my understanding is that both the Indonesian government and the State Department are comfortable with what the court said in December 2005, which is discovery limited to personal jurisdiction limited to EMOI and the conduct, if any, by non-EMOI defendants which took place in the United States which may be a proximate cause of conduct which took place in Indonesia.").

On the other hand, plaintiffs at oral argument suggested that a new paragraph be added to the proposed Order which reads as follows:

> Ordered: That the fact that a document subject to discovery is located in Indonesia shall not by its geographical location alone relieve any party of producing that document subject to a reservation of any legitimate objection supporting the non-production of such a document. As to any claim advanced by any party for with-

> holding such documents, the objecting party shall prepare a log as to any document located in Indonesia which is sought to be withheld. The log shall identify the author, the recipients of any copies of the document, its date, and a narrative description of its substance. After completion of document production from non-EMOI defendants, the parties may move for production of such materials in accordance with the Federal Rules of Procedure with the matter being referred in the first instance for resolution by the Magistrate.

Id. at 20. This proposed addition seems to endorse the two-phase method of discovery, although it also seeks to index and log the Indonesia documents now.

Such a step is not necessary at this time. To the extent plaintiffs are concerned about preserving the documents, defense counsel represented on the record that "all of the documents [in Indonesia] are preserved and protected just as we promised they would be many years ago. No documents have been moved, destroyed. Nothing has happened to that evidence." *Id.* at 17.[2] Moreover, this is not merely a matter of indexing the documents in Indonesia. Plaintiffs' proposal also contemplates a review and search of the documents to determine which documents are responsive. It makes more sense, however, for the sake of convenience, time, and expense, for the parties to first determine the issue of jurisdiction over EMOI and the knowledge and acts of the non-EMOI defendants.

Regarding the proper scope of discovery on the non-EMOI defendants, the parties disagree about whether "merits" dis-

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[2] Consistent with his representations at the hearing and pursuant to this Court's request, defense counsel has confirmed in writing that the potentially responsive documents are preserved in a secure location in Indonesia. *See* Letter from Robert J. Meyer to Judge Oberdorfer, May 3, 2006 (dkt no. 157).

covery is appropriate. Yet the parties acquiesce to discovery that sounds remarkably similar. *Compare id.* at 14-15 (contemplating discovery regarding "the conduct, if any, by non-EMOI defendants which took place in the United States which may be a proximate cause of conduct which took place in Indonesia.") (counsel for defendants), *with id.* at 19 ("I hear counsel for Exxon defendants saying, [w]ell, it is appropriate for plaintiffs to discover of the non-EMOI defendants what they did, what they didn't do, and what they knew that merits discovery. And that's what Your Honor provides for on page 1 of your order.") (counsel for plaintiffs). Part of the confusion may lie in the fact that Magistrate Judge Kay's March 6, 2006 Memorandum describes a scope of discovery that is arguably narrowed by the Order that accompanied that Memorandum.

An Order accompanying this Memorandum accordingly supplements the March 6, 2006 Order.

Dated: May 3, 2006

/s/ Louis F. Oberdorfer
UNITED STATES DISTRICT JUDGE

APPENDIX K

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT
September Term, 2006
01cv01357

[Filed on: February 21, 2007]

No. 05-7162

[1024106]
JOHN DOE, Village A, Aceh, Indonesia, *et al.*,
Appellees,

v.

EXXON MOBIL CORPORATION, *et al.*,
Appellants.

BEFORE: Sentelle and Kavanaugh,* Circuit Judges, and Edwards, Senior Circuit Judge

ORDER

Upon consideration of appellants' petition for rehearing filed February 12, 2007, it is

ORDERED that the petition be denied.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: Michael C. McGrail
Deputy Clerk

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* Circuit Judge Kavanaugh would grant the petition for rehearing.

APPENDIX L

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CASE NUMBER 1:01CV01357
JUDGE: Louis F. Oberdorfer
DECK TYPE: General Civil
DATE STAMP: 06/19/2001

JOHN DOE I, Village A, Aceh, Indonesia, JOHN DOE II, Village, B, Aceh, Indonesia, JOHN DOE III, Village C, Aceh, Indonesia, JOHN DOE IV, Village D, Aceh, Indonesia, JOHN DOE V, Village E, Aceh, Indonesia, JOHN DOE VI, Village F, Aceh, Indonesia, JOHN DOE VII, Village G, Aceh, Indonesia, JANE DOE I, Village H, Aceh, Indonesia, JANE DOE II, individually and as Administratrix of her deceased husband's estate, Village I, Aceh, Indonesia, JANE DOE III, individually and as Administratrix of her deceased husband's estate, Village J, Aceh Indonesia, and JANE DOE IV, individually and as Administratrix of her deceased husband's estate, Village K, Aceh, Indonesia,

Plaintiffs,

vs.

EXXON MOBIL CORPORATION, 5959 Las Colinas Boulevard, Irving, Texas, 75039-2298, EXXON MOBIL OIL INDONESIA INC., c/o Exxon Mobil Corp., 5959 Las Colinas Boulevard, Irving, Texas, 75039-2298, MOBIL CORPORATION, MOBIL OIL CORPORATION, c/o Exxon Mobil Corp., 5959 Las Colinas Boulevard, Irving, Texas, 75039-2298, and PT ARUN LNG CO., c/o Exxon Mobil Corp., 5959 Las Colinas Boulevard, Irving, Texas, 75039-2298,

Defendants.

COMPLAINT FOR EQUITABLE RELIEF AND DAMAGES

COMPLAINT

I. INTRODUCTION—NATURE OF THE ACTION

1. Plaintiffs John Doe I, John Doe II, John Doe III, John Doe IV, John Doe V, John Doe VI, John Doe VII, Jane Doe I, Jane Doe II, Jane Doe III, and Jane Doe IV, (hereafter referred to as "Plaintiffs" unless otherwise specified), on behalf of themselves and, with respect to Jane Doe II, Jane Doe III, and Jane Doe IV, as Administratrices of the estates of John Doe VIII, John Doe IX and John Doe X, their deceased husbands, bring this Complaint for equitable relief and for damages to remedy the injury to their persons inflicted by members of the Indonesian military hired to perform "security" services on behalf of Defendants Exxon Mobil Corporation, Exxon Mobil Oil Indonesia Inc, Mobil Corporation, and PT Arun LNG, Co. (hereafter collectively referred to as "Defendants" unless otherwise specified).

2. This is an action for declaratory judgment pursuant to the Declaratory Judgments Act, 28 U.S.C. § 2201, *et seq.*, as well as for compensatory and punitive damages, and injunctive relief. The claims in this action arise from Defendants' conduct in connection with the operation of their natural gas extraction and processing facilities in Aceh province, Indonesia. Plaintiffs have been subjected to serious human rights abuses, including genocide, murder, torture, crimes against humanity, sexual violence, and kidnaping in violation of the Alien Tort Claims Act ("ATCA"), 28 U.S.C. § 1350, the Torture Victims Protection Act ("TVPA"), 28 U.S.C. §1350 (note), international human rights law, and the statutory and common tort law of the District of Columbia.

3. Plaintiffs do not have access to an independent or functioning legal system within Indonesia to raise their complaints. Further, if they complain to the military authorities,

they would face certain retribution and punishment from these authorities. Plaintiffs have pursued the claims set forth herein within a reasonable time of learning of the prospect for bringing an action in the United States courts.

II. JURISDICTION AND VENUE

4. This Court has jurisdiction pursuant to 28 U.S.C. § 1331, the ATCA and the TVPA, 28 U.S.C. § 1350, for the alleged violations of international human rights law. Supplemental jurisdiction exists over the state law causes of action pursuant to 28 U.S.C. § 1367. Personal jurisdiction over defendants is based on D.C. Statutes § 13-423.

5. Venue properly lies in this Judicial District pursuant to 28 U.S.C. §1391(b) and (c).

III. PARTIES

Plaintiffs

6. Plaintiff John Doe I is a citizen of Aceh Province, Indonesia and resides in Village A. He is an "alien" within the meaning of the ATCA. He brings this action for equitable relief and for damages on behalf of himself to remedy the injuries to his person caused by the wrongful conduct of Defendants, their joint venture partners, and/or their agents, as described more fully herein, and to prevent future harm from occurring. He fears for his life and the lives of his fellow villagers if he were to disclose his identity and the identity of his village, but will nevertheless provide such disclosures in accordance with the terms of a confidentiality agreement mutually agreed upon by the parties.

7. Plaintiff John Doe II is a citizen of Aceh Province, Indonesia and resides in Village B. He is an "alien" within the meaning of the ATCA. He brings this action for equitable relief and for damages on behalf of himself to remedy the injuries to his person caused by the wrongful conduct of Defendants, their joint venture partners, and/or their agents,

as described more fully herein, and to prevent future harm from occurring. He fears for his life and the lives of his fellow villagers if he were to disclose his identity and the identity of his village, but will nevertheless provide such disclosures in accordance with the terms of an appropriate confidentiality agreement or order.

8. Plaintiff John Doe III is a citizen of Aceh Province, Indonesia and resides in Village C. He is an "alien" within the meaning of the ATCA. He brings this action for equitable relief and for damages on behalf of himself to remedy the injuries to his person caused by the wrongful conduct of Defendants, their joint venture partners, and/or their agents, as described more fully herein, and to prevent future harm from occurring. He fears for his life and the lives of his fellow villagers if he were to disclose his identity and the identity of his village, but will nevertheless provide such disclosures in accordance with the terms of an appropriate confidentiality agreement or order.

9. Plaintiff John Doe IV is a citizen of Aceh Province, Indonesia and resides in Village D. He is an "alien" within the meaning of the ATCA. He brings this action for equitable relief and for damages on behalf of himself to remedy the injuries to his person caused by the wrongful conduct of Defendants, their joint venture partners, and/or their agents, as described more fully herein, and to prevent future harm from occurring. He fears for his life and the lives of his fellow villagers if he were to disclose his identity and the identity of his village, but will nevertheless provide such disclosures in accordance with the terms of an appropriate confidentiality agreement or order.

10. Plaintiff John Doe V is a citizen of Aceh Province, Indonesia and resides in Village E. He is an "alien" within the meaning of the ATCA. He brings this action for equitable relief and for damages on behalf of himself to remedy the injuries to his person caused by the wrongful conduct of

Defendants, their joint venture partners, and/or their agents, as described more fully herein, and to prevent future harm from occurring. He fears for his life and the lives of his fellow villagers if he were to disclose his identity and the identity of his village, but will nevertheless provide such disclosures in accordance with the terms of an appropriate confidentiality agreement or order.

11. Plaintiff John Doe VI is a citizen of Aceh Province, Indonesia and resides in Village F. He is an "alien" within the meaning of the ATCA. He brings this action for equitable relief and for damages on behalf of himself to remedy the injuries to his person caused by the wrongful conduct of Defendants, their joint venture partners, and/or their agents, as described more fully herein, and to prevent future harm from occurring. He fears for his life and the lives of his fellow villagers if he were to disclose his identity and the identity of his village, but will nevertheless provide such disclosures in accordance with the terms of an appropriate confidentiality agreement or order.

12. Plaintiff John Doe VII is a citizen of Aceh Province, Indonesia and resides in Village G. He is an "alien" within the meaning of the ATCA. He brings this action for equitable relief and for damages on behalf of himself to remedy the injuries to his person caused by the wrongful conduct of Defendants, their joint venture partners, and/or their agents, as described more fully herein, and to prevent future harm from occurring. He fears for his life and the lives of his fellow villagers if he were to disclose his identity and the identity of his village, but will nevertheless provide such disclosures in accordance with the terms of an appropriate confidentiality agreement or order.

13. Plaintiff Jane Doe I is a citizen of Aceh Province, Indonesia and resides in Village H. She is an "alien" within the meaning of the ATCA. She brings this action on behalf of herself to remedy the injuries to her person caused by the

wrongful conduct of Defendants and Defendants' joint venture partners and/or their agents, and to prevent future harm from occurring, as more fully set forth herein. She fears for her life and the lives of her fellow villagers if she were to disclose her identity and the identity of her village, but will nevertheless provide such disclosures in accordance with the terms of an appropriate confidentiality agreement or order.

14. Plaintiff Jane Doe II is a citizen of Aceh Province, Indonesia and resides in Village I. She is an "alien" within the meaning of the ATCA. Her husband, John Doe VIII, was murdered by the wrongful acts of Defendants, their joint venture partners, and/or their agents as described more fully herein. She serves as the Administratrix of her deceased husband's estate. She brings this action for equitable relief and for damages on behalf of herself, and as Administratrix of her deceased husband's estate, to remedy injuries caused by the wrongful conduct of Defendants, and to prevent future harm from occurring, as more fully set forth herein. She fears for her life and the lives of her fellow villagers if she were to disclose her identity and the identity of her village, but will nevertheless provide such disclosures in accordance with the terms of an appropriate confidentiality agreement or order.

15. Plaintiff Jane Doe III is a citizen of Aceh Province, Indonesia and resides in Village J. She is an "alien" within the meaning of the ATCA. Her husband, John Doe IX, was "disappeared" by security forces employed by Defendants, and, based on information and belief, is presumed to have been murdered by the wrongful conduct of Defendants, their joint venture partners, and/or their agents as described more fully herein. She brings this action for equitable relief and for damages on behalf of herself, and as Administratrix of her deceased husband's estate, to remedy injuries caused by the wrongful conduct of Defendants, as more fully set forth herein, and to prevent future harm from occurring. She fears for her life and the lives of her fellow villagers if she were to

disclose her identity and the identity of her village, but will nevertheless provide such disclosures in accordance with the terms of an appropriate confidentiality agreement or order.

16. Plaintiff Jane Doe IV is a citizen of Aceh Province, Indonesia and resides in Village K. She is an "alien" within the meaning of the ATCA. Her husband, John Doe X, was murdered by the wrongful acts of Defendants, their joint venture partners, and/or their agents as described more fully herein. She brings this action for equitable relief and for damages on behalf of herself, and as Administratrix of her deceased husband's estate, to remedy injuries caused by the wrongful conduct of Defendants, as more fully set forth herein, and to prevent future harm from occurring. She fears for her life and the lives of her fellow villagers if she were to disclose her identity and the identity of her village, but will nevertheless provide such disclosures in accordance with the terms of an appropriate confidentiality agreement or order.

Defendants

The Exxon Mobil Corporation

17. Defendant Exxon Mobil Corporation ("Exxon Mobil") is a New Jersey corporation doing business and authorized to do business in the District of Columbia. Exxon Mobil maintains numerous places of business within the District of Columbia, including a major office at 2001 Pennsylvania Avenue N.W. Exxon Mobil was created on November 30, 1999 though the merger of Exxon Corporation and Mobil Corporation, and is the successor in interest to all assets previously owned by the merged entities, as well as all liabilities. As a result of the merger, Mobil Corporation merged into Exxon Corporation, which then changed its name to Exxon Mobil. Also as a result of the merger, Mobil Corporation became a wholly-owned subsidiary of Exxon Mobil. Having reported approximately $210 billion in revenue for the year 2000, Exxon Mobil is now listed as the

largest publicly held American corporation by the magazine *Fortune*. In calendar year 2000, Exxon Mobil reported the world's largest corporate profits, and again reported record first quarter profits for calender year 2001 of approximately $5.05 billion, excluding the effects of the November 30, 1999 merger.

18. Exxon Mobil has several divisions and hundreds of affiliates, some of which are Defendants named herein. Divisions and affiliated companies of Exxon Mobil operate or market products in the United States and about 200 other countries and territories. Their principal business is energy, involving exploration for, and production of, crude oil and natural gas, manufacturing of petroleum products and transportation and sale of crude oil, natural gas and petroleum products.

19. Exxon Mobil also is a major manufacturer and marketer of basic petrochemicals, including olefins, aromatics, polyethylene and polypropylene plastics and a wide variety of specialty products.

20. Exxon Mobil is also engaged in exploration for, and mining and sale of coal, copper and other minerals. It also has interests in electric power generation facilities. Its affiliates also conduct extensive research programs in support of these businesses.

21. Defendant Exxon Mobil is directly, and indirectly through various wholly-owned subsidiaries and divisions, engaged in the marketing and distribution of petroleum products throughout the District of Columbia. Among its activities within the District of Columbia, Exxon Mobil sells marine and automotive fuel products to venders, including service station dealers; conducts business with and through various product and retail service distributors; solicits and advertises its own credit and debit cards; and regularly contracts with the Washington Post and other publications for

the publication of opinion editorials promoting its business interests. In addition, from its place of business at 2001 Pennsylvania Avenue N.W., Exxon Mobil engages in activities to further its business interests through interactions with Members of Congress and the Executive Branch, and various regulatory agencies of the U.S. Government. Exxon Mobil also employs numerous employees and contractors within the District of Columbia to perform lobbying, public relations, advertising, and other business promotion activities. Furthermore, Exxon Mobil has numerous shareholders, including institutional investors, who reside in the District of Columbia.

22. Defendant Mobil Corporation ("Mobil") is a Delaware corporation that, since the completion of its merger with the Exxon Corporation on November 30, 1999, is a wholly owned subsidiary of Defendant Exxon Mobil.

23. Mobil was originally incorporated in Delaware in 1976, and conducted its business primarily through its wholly owned subsidiaries, including Defendant Mobil Oil Corporation ("Mobil Oil"), a New York Corporation.

24. As a wholly-owned subsidiary and/or affiliate company of Defendant Exxon Mobil, Defendant Mobil Oil is doing business and is authorized to do business in the District of Columbia, both on its own behalf and through its position as a wholly-owned subsidiary and/or affiliate company of Defendant Exxon Mobil. Upon information and belief, Defendant Mobil Oil is engaged in the marketing and distribution of petroleum products throughout the District of Columbia, and, among its activities, sells automotive gasoline and other products to service station dealers as well as leasing service stations to dealers under retail service-station leases and sales agreements using the trademarked name "Mobil."

25. Mobil Oil Indonesia Inc. ("MOI") is or was a Delaware Corporation that, on information and belief, originally was incorporated by Defendant Mobil Oil or another of

Defendant Mobil's wholly-owned subsidiaries for the purpose of exploring, exploiting and developing oil and natural gas located in Indonesia, including the Arun area of that country's Aceh Province, located in Northern Sumatra. On information and belief, as of November 30, 1999, Defendant Exxon Mobil became the parent of MOI, and MOI was reconstituted as a Delaware corporation under the name Exxon Mobil Oil Indonesia, Inc. ("EMOI"), which is named as a Defendant herein.

26. Hereafter, unless otherwise specified, Defendants Exxon Mobil, Mobil, Mobil Oil and EMOI shall collectively be referred to as the "Exxon Mobil Defendants." Additionally, unless otherwise specified, Defendants Mobil and Mobil Oil, together with MOI, shall collectively be referred to herein as the "Mobil Companies."

27. Upon information and belief, Defendant Exxon Mobil and its predecessors in interest, for the purpose of attempting to shield themselves from liability or responsibility from wrongful acts committed in furtherance of their natural gas activities in Indonesia's Aceh Province, created, or caused to have created, several wholly-owned subsidiaries, divisions and/or affiliated companies. These entities include, but are not limited to Mobil Oil Exploration & Producing Southeast, Inc. and Mobil Exploration Indonesia Inc., and are referred to herein as the "Other EXMOBCOs."

28. Defendant Exxon Mobil is fully liable for its own acts and the acts of any subsidiaries, affiliates, divisions or other entities directly or indirectly under its ownership and control, including Defendants Mobil, Mobil Oil and EMOI, as well as the Other EXMOBCOs. Any such subsidiaries, affiliates, divisions or other entities are alter egos of Defendant Exxon Mobil, or, alternatively, are in an agency relationship with it. Exxon Mobil is vicariously liable under the doctrine of *respondeat superior* for the acts or omissions of any sub-

sidiaries, affiliates, divisions or other entities under its ownership and control.

PT Arun

29. Defendant PT Arun LNG, Co. ("PT Arun") is a joint venture company that is owned 55% by Indonesia's state owned oil and gas company, Pertamina, 35% by Exxon Mobil, and 10% by a Japanese company named Japan Indonesia LNG Company, Limited. On information and belief, PT Arun originally was created in or about 1976, and produces liquefied natural gas at a facility located in Indonesia's Arun area, which is located in the Aceh Province, Northern Sumatra. Defendant Exxon Mobil exercises ownership and significant control over PT Arun by virtue of its 35% ownership, as well as its ongoing and exclusive contracts to supply PT Arun with 100% of the natural gas it liquefies and sells.

30. PT Arun was originally created for the purpose of processing the natural gas owned and produced by Defendant Mobil Oil, and/or one or more of its wholly owned subsidiaries that was under its direct control and supervision, including MOI. As of November 30, 1999, Defendant Exxon Mobil succeeded to the interests of the Mobil Companies and, accordingly, now serves as the agent of Defendant PT Arun in the United States. Among other services Exxon Mobil performs as an agent for Defendant PT Arun, Exxon Mobil promotes the joint business interests in Indonesia through interactions with Members of Congress and the Executive Branch, and various regulatory agencies of the U.S. Government. Based on information and belief, Exxon Mobil, and its predecessors in interest, also served as the agent of PT Arun in Washington D.C. to attempt to secure funding, risk insurance, and security for the PT Arun joint venture, approaching, among others, the World Bank, the Asian Development Bank, the Overseas Private Investment Corporation, and the Export-Import Bank. Most recently, Exxon Mobil has

worked to ensure that the U.S. government would not intervene in any way in Aceh that might damage or devalue the joint business interests of Exxon Mobil and PT Arun.

IV. BACKGROUND.

The LNG Project in Arun, Indonesia

31. Defendant Mobil Oil or its predecessors in interest commenced business operations in Indonesia more than one hundred years ago. In or about 1971, Defendant Mobil Oil, working with Pertamina, discovered a large natural gas field in and around Arun, which is located in Indonesia's Aceh Province, Northern Sumatra.

32. Upon discovering the natural gas field in the Arun area, Mobil Oil contracted with the Indonesian government, which at that time was controlled by the brutal military regime headed by General Suharto, to obtain exclusive rights to explore for and produce natural gas in the Arun area in exchange for providing the Suharto family with "blank shares" in MOI, as well as other forms of direct and indirect payment.

33. Thereafter, Mobil Oil or one or more of its wholly-owned subsidiaries, affiliates or divisions, developed natural gas facilities to extract the natural gas, and Defendant PT Arun developed a natural gas liquefication facility to process it for shipment. Now, since the November 30, 1999 merger, Exxon Mobil, either directly or indirectly through its corporate subsidiaries, affiliates and divisions, including the Mobil Companies and/or the Other EXMOBCOs, owns and operates the extraction facilities, and, succeeded to the Mobil Companies' 35% share in Defendant PT Arun, which continues to own and operate the natural gas liquefication processing facility.

34. Collectively, the Exxon Mobil Defendants' extraction facilities and Defendant PT Arun's liquification processing facilities will be referred to as "the Arun Project."

35. Since its development, the Arun Project has been one of the largest and most profitable natural gas projects in the world, and has helped catapult Indonesia as one of the world's largest natural gas producers and exporters.

Aceh Province

36. Aceh is a relatively small province located in Northern Sumatra, Indonesia. It has a population of approximately four million people. Although it is largely undeveloped, it has extensive oil and natural gas deposits, as well as timber and minerals, and is responsible for a substantial amount of Indonesia's exports.

37. For many years, certain factions in Aceh have sought to obtain Aceh's independence from Indonesia to allow the ethnic Achenese to be free from the historical oppression by the Government of Indonesia. Recent reports have estimated that a separatist movement consisting of approximately 2,000 individuals is engaged in an effort to obtain Aceh's secession from Indonesia, and that the Indonesian military has placed more than 30,000 troops from other parts of the 13,000 island nation to squelch their movement.

38. In or about 1989 and ending in or about August, 1998, the Indonesian government, then under the rule of General Suharto, designated Aceh as a "military operational area" also known by the Indonesian acronym "DOM," and directed the Indonesian military to occupy the province. During the nine year DOM period, the Indonesian military slaughtered, tortured, maimed, raped, and "disappeared" thousands of Achenese civilian villagers who were not in any way connected to the separatist movement. The DOM ended only when General Suharto's dictatorship was ousted in mid-1998. During the months following General Suharto's removal, a national human rights commission investigated the Indonesian military's operations and activities in Aceh during the DOM period. Various fact-finding teams that traveled to

Aceh unearthed a host of egregious human rights abuses against Achenese civilians, and several mass graves containing Achenese victims were discovered.

The Defendants' Complicity in the Aceh Atrocities

39. Because of the extreme unpopularity of the Suharto regime, and the public knowledge that the Mobil Defendants had provided shares in Defendant MOI to General Suharto's government and/or family, security was an essential element of the Arun Project. The extraction and liquefication activities could not have been performed without a heavy military presence by the Indonesian military because of the involvement with and identification with the project by the Suharto regime. Accordingly, the Suharto regime agreed with the Mobil Companies as part of the above-described MOI stock transaction to dedicate one or more military units of the national army, known as the Tentara Nasional Indonesia ("TNI"), to provide "security" for the Arun Project. At least one unit of the TNI, No. 113, was assigned for the sole and specific purpose of providing such "security" for the Arun Project. The Mobil Companies and/or Defendant PT Arun thereafter employed Unit 113, as well as other units of the TNI, and paid the Indonesian military a regular monthly or annual fee for such services.

40. At all times relevant herein, from the inception of the Arun Project to the present, Defendants and their predecessors in interest have had the ability to control and direct, and have indeed controlled and directed, the activities of the TNI units assigned to protect Defendants' interests in the Arun Project. Such control and direction includes conditioning payment on the provision of specific security services, making decisions about where to place bases, strategic mission planning, and making decisions about specific deployment areas.

41. The Mobil Companies and Defendant PT Arun were no strangers to the atrocities committed by the Indonesian

military during the DOM period in Aceh. At the inception of the Arun Project, the Mobil Companies were specifically aware of the Suharto regime's extreme brutality and the public record of TNI's extreme brutality, particularly with respect to ethnic minorities within Indonesia. This knowledge was repeatedly confirmed by ongoing, specific, and publicly reported acts of terror and violence by the TNI, including those assigned specifically to provide "security" for the Arun Project. By November 30, 1999, when Defendant Exxon Mobil became the parent company of the Mobil Companies following the merger of Exxon Corporation with Mobil, there was a clear public record of pervasive and systematic human rights violations perpetrated upon the innocent noncombatant villagers of Aceh by the TNI troops specifically hired to provide "security" for the Arun Project and that had received direct support from the Mobil Companies and Defendant PT Arun. For example, the Mobil Companies provided logistical and material support to the Indonesian troops throughout the DOM period, including:

(a) the construction and/or provision of buildings and supplies for two military barracks located on or next to the Mobil Companies' natural gas extraction facilities and Defendant PT Arun's liquefication plant, commonly referred to as "Post 13" and "Rancong Camp," respectively, and which were used by Indonesian "Kopassus" (special forces) units to interrogate, torture and murder Achenese civilians suspected of engaging in separatist activities;

(b) the provision of heavy equipment such as excavators so that the Indonesian military could dig mass graves to bury their Achenese victims; and

(c) the use of roads constructed by the Mobil Companies and/or their contractors to transport the military's Achenese victims to mass graves located

near the Mobil Companies' extraction operations and Defendant PT Arun's adjoining liquefication facilities.

Thus, acting upon the ethnic tensions between the Aceh people and the Indonesian government, the Indonesian military used the pretense of providing "security" for the Arun Project to practice genocide on the people of Aceh, and in furtherance of this program, the troops specifically assigned to protect the Arun Project used the facilities at Rancong Camp and Post 13 to round up, torture and slaughter thousands of ethnic Achenese people.

42. The Mobil Companies and Defendant PT Arun knew or should have known that their logistical and material support was being used to effectuate the Indonesian military's commission of the human rights atrocities outlined above. Even if the Mobil Companies and Defendant PT Arun were unaware of these atrocities at the time they were committed, they nevertheless learned of them after the fact, yet thereafter continued to use the same troops for "security," and even demanded an increase in the number of troops protecting the Arun Project, thereby acknowledging and ratifying the Indonesian military's conduct.

43. Throughout the DOM period, the Mobil Companies and Defendant PT Arun maintained continuous operations at the Arun Project and profited handsomely therefrom, having made billions of dollars in profits.

44. Since the collapse of the Suharto regime in 1998, there has been continuous violence in Aceh of the same character as outlined above. While continuing to serve as Defendants' "security" service, the TNI continues to act without restraint, and continues to practice ethnic genocide. As in other Indonesian provinces, including East Timor and Kalimantan, with knowledge and acquiescence of Defendants, the TNI in Aceh escalated the genocide of the people

of Aceh following the fall of the Suharto regime. The ongoing slaughter in Aceh is widely acknowledged internationally, and numerous human rights groups and governmental agencies have documented the international human rights violations. Numerous human rights groups, including several based in Aceh with current information on the genocide of the people of Aceh, specifically requested that the Mobil Companies and now, since November 30, 1999, Defendant Exxon Mobil, cease its operations in Aceh until it could make arrangements to operate without using the murderous TNI for security. These requests were refused, and Defendant Exxon Mobil has instead demanded that the Indonesian military security forces *increase* the number of troops and take all necessary steps to guarantee the security of the Arun Project, without regard for, and with full knowledge of, the human rights impact on the Achenese people who live near the Arun Project. Moreover, the Mobil Companies and, since November 30, 1999, Defendant Exxon Mobil, have continued to pay for the TNI's "security services" knowing and expecting that the military units specifically assigned to provide them with such services would continue to take any and all actions, including extreme violence of the character and nature described above, in order to ensure that the Arun Project would continue operating without interruption.

45. On or about March 9, 2001, after continuously operating during years of genocide, murder, torture, rape, kidnaping, unlawful detainment, and other human rights violations inflicted upon the people of Aceh by the Exxon Mobil "security" forces, Defendant Exxon Mobil shut down most of the Arun Project because the TNI could no longer "guarantee" the security of the physical facilities of the Arun Project and the Project employees.

46. Defendants took no action or took insufficient action to ensure that human rights violations would not be perpetrated by its TNI security forces using Arun Project support

and facilities. As outlined above, Defendants have instead directly supported these human rights abuses by supporting the military security forces in an effort to protect Defendants' interest in the Project. Defendants, in furtherance of the Arun Project, provided direct payments and supplies to the TNI security forces assigned to protect the Project. Defendants have also purchased military equipment for the security forces and have paid mercenaries to provide advice, training, intelligence and equipment to the TNI military in the Project area.

47. Defendants' support of the Indonesian military has also extended beyond the Arun Project area, and includes general support for the TNI to ensure that Defendants' business arrangement with the Indonesian government in Aceh is not nullified by the creation of an independent state for the people of Aceh as the result of a democratic uprising. Defendants' support for the security forces and the Indonesian government is designed to keep the Indonesian Government in power during the life of the Arun Project. The Indonesian military security forces have used funds from Defendants to support military operations designed to crush any dissent within Aceh, and to increase the capacity of the military to engage in repressive tactics against Achenese separatists. Defendants, therefore, directly supported and continue to support the military's reign of terror in Aceh.

V. INJURIES AND HARM SUFFERED BY THE PLAINTIFFS

48. Plaintiff John Doe I resides in Village A, which is located near the Arun Project area. In January, 2001, while riding his bicycle cart to the local market to sell his vegetables, he was accosted by soldiers who were assigned to Exxon Mobil's TNI Unit 113. The solders shot him in the wrist, threw a hand grenade at him and then left him for dead. Plaintiff suffered severe injuries as a result of this attack, including the loss of his right hand and left eye and several

severe wounds to his body. This unprovoked attack was in furtherance of the TNI's policy of genocide towards the people of Aceh, and constituted torture for which Defendants remain liable.

49. Plaintiff John Doe II resides in Village B, which is located near the Arun Project area. In or about August, 2000, while riding on his motorbike, he was stopped on the road by soldiers assigned to Exxon Mobil's TNI Unit 113. The soldiers put his motorbike in their truck and then beat him severely on his head and body. The soldiers then tied his hands behind his back, put a blindfold on him, and threw him in their truck and took him to what he later learned was Rancong Camp. The soldiers detained and tortured him there for a period of three months, all the while keeping him blindfolded. Plaintiff John Doe II sustained severe injuries as a result of the beatings inflicted by the soldiers, who also tortured him using electricity all over his body, included his genitals. After approximately three months, the soldiers took off his blindfold, took him outside the building where he had been detained and showed him a large pit where there was a large pile of human heads. The soldiers threatened to kill him and add his head to the pile. Plaintiff John Doe II eventually was released and he went back to his home. Shortly thereafter, the soldiers came to his house. Plaintiff John Doe II escaped from the soldiers, but the soldiers burned down his house. Defendants are liable for the acts described herein.

50. Plaintiff John Doe III resides in village C, which is located near the Arun Project area. In or about July, 2000 he was riding his motorbike to visit a refugee camp that is located near "Point A" of the Exxon Mobil LNG complex. The refugee camp houses people who have been displaced by the destruction of their homes by the Exxon Mobil security forces. As he approached the camp, soldiers from Exxon Mobil's TNI Unit 113 shot him in three places on his leg. He fell down and lost consciousness. The soldiers took him to a

police or military camp and tortured him for several hours while he continued to bleed from the gunshot wounds. The soldiers broke his kneecap, smashed his skull, and burned him with cigarettes. The soldiers then took him to the police headquarters in North Aceh, and the police took him to the hospital for treatment. When his wounds were treated, he was returned to the TNI Unit 113 soldiers. The soldiers kept him in custody for approximately one month and tortured him regularly. After one month, Plaintiff John Doe III was released, but only after a local human rights organization bribed government officials to secure his release. Defendants are liable for the acts described herein.

51. Plaintiff John Doe IV resides in Village D, which is located near the Arun Project area. In or about July, 2000, while he was traveling to a nearby village, he was accosted by soldiers assigned to Exxon Mobil's TNI Unit 113. The soldiers beat him and then handcuffed him and blindfolded him. They took him to Post 13 where they continued to torture him by beating him and threatening to kill him. The soldiers accused him of being part of GAM, an Achenese separatist movement. Plaintiff John Doe IV told the soldiers that he is not a member of GAM. The soldiers nevertheless threw him to the ground and, using a soldier's knife, carved the letters "GAM" into his back. The soldiers kept Plaintiff John Doe IV in custody for several weeks, regularly torturing him and severely injuring him. He was eventually released after a local human rights organization bribed the soldiers to secure his release. Defendants are liable for the acts described herein.

52. Plaintiff John Doe V resides in Village E, which is located near the Arun Project area. In or about August, 1990, he was taken from his home by soldiers assigned to Exxon Mobil's TNI Unit 113, who took him to a building located inside the Exxon Mobil compound. He was interrogated and tortured there for several days. The soldiers burned him with

cigarettes, beat him severely, and shocked him with electricity. As a result, Plaintiff John Doe V sustained severe injuries to his head and body. Plaintiff John Doe V eventually was released, but in or about December, 2000, TNI Unit 113 soldiers came to his house and burned it down. At that time, the soldiers also physically beat his son and broke his son's leg. Defendants are liable for the acts described herein.

53. Plaintiff John Doe VI resides in Village F, which is located near the Project Arun area. In or about November, 2000, he was accosted by soldiers assigned to Exxon Mobil's TNI Unit 113, who took him into custody and accused him of being a member of GAM. Plaintiff John Doe VI told the soldiers that he is not a member of GAM. The soldiers nevertheless took him to their camp and tortured him for several hours. Among other things, they beat him all over his body with large blocks of wood. After he was tortured, the soldiers took him back to his village and ordered him to identify all villagers who were members of GAM. Plaintiff John Doe told the soldiers that he did not know who was a GAM member and repeated that he was not a GAM member. The soldiers then beat him again and shot him in the leg. They took him to a hospital for treatment, where he stayed for approximately one week. When he was ready to be released from the hospital, the soldiers took him to the police headquarters in North Aceh. He was kept in custody and tortured for four months, causing him to suffer additional severe injuries. At that point, the leader of his village took up a collection from the villagers and raised enough money to bribe the police into securing his release. Defendants are liable for the acts described herein.

54. Plaintiff John Doe VII resides in village G, which is located near the Arun Project area. In or about January, 2001, he was accosted by soldiers assigned to Exxon Mobil's TNI Unit 113. The soldiers kicked John Doe VII and took him to an office inside the Exxon Mobil compound. There, they beat

him with the butt of a gun and a hammer, causing him to suffer severe injuries. The next day, the soldiers released him. Defendants are liable for the acts described herein.

55. Plaintiff Jane Doe I resides in Village H, which is located near the Arun Project area. In March, 2001, when Plaintiff Jane Doe I was pregnant, an Indonesian soldier assigned to Defendant Exxon Mobil's TNI Unit 113 forced his way into Jane Doe I's house wielding a rifle. He threatened to kill her and her unborn child with his gun. The soldier then beat and sexually assaulted Plaintiff Jane Doe I.

56. Plaintiff Jane Doe II resides in Village I, which is located near the Arun Project area. In or about December, 2000, while her husband, John Doe VIII, was working in his rice field, Indonesian soldiers assigned to Exxon Mobil's TNI Unit 113, came to Village B and burned several homes and stores. The soldiers also opened fire on the field where Jane Doe II's husband was working and killed him. His murder was an unprovoked but intentional act of genocide and murder.

57. Plaintiff Jane Doe III resides in Village J, which is located near the Arun Project area. In September, 2000, Indonesian soldiers assigned to Exxon Mobil's TNI Unit 113 kidnaped Plaintiff Jane Doe III's husband, John Doe IX, at gunpoint. He has not been found since he was taken away by the soldiers and Plaintiffs allege that he has been killed by Exxon Mobil TNI Unit 113 and to have become yet another of the soldier's victims who have been "disappeared." His apparent murder was an unprovoked but intentional act of genocide and murder for which Defendants remain liable.

58. Plaintiff Jane Doe IV resides in Village K, which is located near the Arun Project area. In December, 2000, soldiers assigned to Exxon Mobil's TNI Unit 113, without provocation, shot and killed her husband, John Doe X, while he was working in the field near their home. His murder was

an unprovoked but intentional act of genocide and murder for which Defendants remain liable.

VI. DEFENDANTS' VIOLATIONS OF LAW

59. Defendants' actions violate, and Plaintiffs' causes of action arise from, the following laws, agreements, conventions, resolutions and treaties, which constitute specific examples of the applicable law of nations or customary international law:

(a) Alien Tort Claims Act, 28 U.S.C. § 1350;

(b) Torture Victim Protection Act, 28 U.S.C. § 1350;

(c) Common law of the United States of America;

(d) United Nations Charter, 59 Stat. 1031, 3 Bevans 1153 (1945);

(e) Universal Declaration of Human Rights, G.A. Res. 217A(iii), U.N. Doc. A/810 (1948);

(f) International Covenant on Civil and Political Rights, G.A. Res. 2220A(xxi), 21 U.N. Doc., GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966);

(g) Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, G.A. res. 39/46, 39 U.N. Doc., GAOR Supp. (No. 51) at 197, U.N. Doc. A/39/51 (1984) (ratified 10/28/98);

(h) Declaration on the Protection of All Persons From Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, G.A. Res. 3452, 30 U.N. Doc., GAOR Supp. (No. 34) at 91, U.N. Doc. A/10034 (1976);

(i) Declaration for the Elimination of Violence against Women (UN General Assembly Resolution);

(j) Vienna Declaration and Programme of Action (World Conference on Human Rights, 1993);

(k) Fourth World Conference on Women Platform for Action (Beijing, 1994);

(l) Convention for the Elimination of Discrimination Against Women (ratified 9/13/84) and Recommendation 19 of the Committee for the Elimination of Discrimination Against Women; and

(m) Statutes and common law of the District of Columbia, including but not limited to wrongful death, theft by coercion, assault and battery, false imprisonment, kidnaping, negligence, recklessness, intentional infliction of emotional distress, negligent infliction of emotional distress, negligence and recklessness.

VII. DEFENDANTS' JOINT VENTURE LIABILITY

60. Defendant Exxon Mobil is a joint venture partner with the Indonesian Government with respect to the Arun Project. The joint venture includes the Indonesian Government's contract granting exploration and production rights to Defendant Exxon Mobil, and/or its predecessors in interest, in exchange for the payment of royalties and other consideration. Also pursuant to this joint venture, the Indonesian Government furnishes TNI troops to provide security to the Exxon Mobil Defendants and their predecessors in interest. As co-venturers with the Government of Indonesia, its state owned oil and gas company, Pertamina, and Defendant PT Arun, the Exxon Mobil Defendants are jointly and severally liable for all of the tortious actions committed by the TNI military security forces in connection with and in furtherance of the Arun Project as described in this Complaint and delineated specifically herein. In committing these tortious actions, based on information and belief, the TNI security forces were acting as a joint venture partner with Defendants,

and were acting within the course and scope of the joint venture with the advance knowledge, acquiescence or subsequent ratification of Defendants. The TNT security forces contractually provided by the Government of Indonesia to Defendants, as part of the understanding with its joint venture partners, were acting in furtherance of the Arun Project to protect the investment made by the joint venturers.

61. Defendants, as part of their contractual arrangements with the Government of Indonesia and/or Pertamina, pay a monthly or annual fee for security services provided by specific units of the TNI. The special military units that provide security for the Arun Project are therefore agents of Defendants. The military security forces, acting as agents of Defendants, have committed the tortious actions described in this Complaint and in connection with and in furtherance of the Arun Project. Defendants are further vicariously liable for all of the tortious actions committed by their agents done in connection with and in furtherance of the Arun Project as described herein. In committing these tortious actions, the military security forces were acting within the course and scope of the agency relationship created by contract with Defendants with the advance knowledge, acquiescence or subsequent ratification of Defendants. The TNI security forces, as part of the understanding with Defendants, were also acting to protect the investment made by Defendants and Pertamina.

62. With respect to all of the causes of action described below, the harm to Plaintiffs was either caused directly by the acts or omissions of Defendants or was caused by the acts or omissions of Defendants' co-venturers, making Defendants jointly and severally liable, or by the acts or omissions of Defendants' agents, making Defendants vicariously liable.

VIII. CAUSES OF ACTION

First Cause of Action
The Alien Tort Claims Act, 28 U.S.C. § 1350 For Murder, Genocide, Torture, Kidnaping and Crimes Against Humanity

63. Plaintiffs incorporate by reference paragraphs 1 through 62 of this Complaint as if set forth herein.

64. Defendants' acts and omissions of intentionally and tortiously entering into contracts for exploitation, exploration and transportation of natural gas with the Government of Indonesia, knowing that performance of such contracts required an arrangement under which TNI troops would be created and deployed specifically to provide security for Defendants' facilities and employees, and that these troops would systematically engage in human rights violations of the indigenous people of Aceh, resulted in serious human rights abuses against Plaintiffs and their fellow villagers. Based on the facts described herein, these human rights abuses include genocide, murder, torture, crimes against humanity, sexual violence, and kidnaping. These acts violate the law of nations, customary international law, and worldwide industry standards and practices, including, but not limited to, the specific laws, agreements, conventions, resolutions and treaties listed in paragraph 59, *supra*. In acting together with the TNI security forces of the Government of Indonesia, Defendants acted under color of law in violating each of the applicable laws, agreements, conventions, resolutions and treaties listed in paragraph 59, *supra*.

65. The claims of Plaintiffs Jane Doe II, Jane Doe III, and Jane Doe IV, based on the deaths of their husbands at the hands of Defendants' TNI security forces, constitute murder. These murders were part of a systematic campaign of extermination of the people of Aceh by Defendants' TNI security forces and, therefore, constitute ethnic genocide.

These acts of murder and genocide violate the law of nations, customary international law, and worldwide industry standards and practices, including, but not limited to, the specific laws, agreements, conventions, resolutions and treaties listed in paragraph 59, *supra*.

66. The claims of Plaintiffs John Doe I, John Doe II, John Doe III, John Doe IV, John Doe V, John Doe VI, and John Doe VII result from their being beaten, burned, shocked with cattle prods, kicked and subjected to other forms of brutality and cruelty. These acts were inflicted intentionally and with malice to cause Plaintiffs severe mental and physical pain and suffering. These acts amounted to torture and violate the law of nations, customary international law, and worldwide industry standards and practices, including, but not limited to, the specific laws, agreements, conventions, resolutions and treaties listed in paragraph 59, *supra*.

67. Plaintiffs John Doe I, John Doe II, John Doe III, John Doe IV, John Doe V, John Doe VI, and John Doe VII were all forcibly removed by Defendants' TNI security forces to a place where they were detained for lengthy periods against their will. These removals and detentions were done intentionally and with malice to cause Plaintiffs severe mental and physical pain and suffering. These acts amounted to kidnaping and violate the law of nations, customary international law, and worldwide industry standards and practices, including, but not limited to, the specific laws, agreements, conventions, resolutions and treaties listed in paragraph 59, *supra*.

68. Defendants committed, or acted in concert to commit, or Defendants' co-venturers or agents committed acts that had the intent and the effect of grossly humiliating and debasing Plaintiffs Jane Doe I, John Doe I, John Doe II, John Doe III, John Doe IV, John Doe V, John Doe VI, and John Doe VII, and the deceased husbands of Plaintiffs Jane Doe II, Jane Doe III and Jane Doe IV, forcing them to act against their will and conscience, inciting fear and anguish, and breaking their

physical and/or moral resistance. Plaintiffs were placed in great fear for their lives and forced to suffer severe physical and psychological abuse and agony. The acts described herein constitute cruel, inhuman or degrading treatment in violation of the law of nations, customary international law, and worldwide industry standards and practices, including, but not limited to, the specific laws, agreements, conventions, resolutions and treaties listed in paragraph 59, *supra*.

69. Defendants' conduct in violation of the law of nations, customary international law, and worldwide industry standards and practices, including, but not limited to, the specific laws, agreements, conventions, resolutions and treaties listed in paragraph 59, *supra*, has caused Plaintiffs significant injury. Defendants are jointly and severally liable for the acts of any and all co-venturers in the Arun Project that are in violation of the law of nations, customary international law, and worldwide industry standards and practices, including, but not limited to, the specific laws, agreements, conventions, resolutions and treaties listed in paragraph 59, *supra*. Defendants are also vicariously liable for any violations of their agents of the law of nations, customary international law, and worldwide industry standards and practices, including, but not limited to, the specific laws, agreements, conventions, resolutions and treaties listed in paragraph 59, *supra*. Plaintiffs are entitled to injunctive relief and to recover compensatory and punitive damages in amounts to be ascertained at trial.

Second Cause of Action
The Torture Victim Protection Act, 28 U.S.C. § 1350
For Torture and Extrajudicial Killing

70. Plaintiffs incorporate by reference paragraphs 1 through 69 of this Complaint as if set forth herein.

71. Defendants' acts and omissions of intentionally and tortiously entering into contracts for exploitation, exploration

and transportation of natural gas with the Government of Indonesia, knowing that performance of such contracts required an arrangement under which specific TNI troops would be created and deployed specifically to provide security for Defendants' facilities and employees, and that these troops would systematically engage in human rights violations of the indigenous people of Aceh, resulted in serious human rights abuses against Plaintiffs. These acts were inflicted intentionally and with malice to cause Plaintiffs severe mental and physical pain and suffering. These acts amounted to torture, with respect to the claims of all of the Plaintiffs, and with respect to the claims brought by Jane Doe II, Jane Doe III, and Jane Doe IV, on behalf of their deceased husbands, also amounted to extrajudicial killings. These acts violate the law of nations, customary international law, and worldwide industry standards and practices, including, but not limited to, the specific laws, agreements, conventions, resolutions and treaties listed in paragraph 59, *supra*. In acting together with the TNI security forces of the Government of Indonesia, Defendants acted under color of law.

72. Defendants' conduct in violation of the law of nations, customary international law, and worldwide industry standards and practices, including, but not limited to, the specific laws, agreements, conventions, resolutions and treaties listed in paragraph 59, *supra*, has caused Plaintiffs significant injury. Defendants are jointly and severally liable for the acts of any co-venturers in the project that are in violation of the law of nations, customary international law, and worldwide industry standards and practices, including, but not limited to, the specific laws, agreements, conventions, resolutions and treaties listed in paragraph 59, *supra*. Defendants are also vicariously liable for any violations of their agents of the law of nations, customary international law, and worldwide industry standards and practices, including, but not limited to, the specific laws, agreements, conventions, resolutions and treaties listed in paragraph 59, *supra*. Plaintiffs are entitled to

injunctive relief and to recover compensatory and punitive damages in amounts to be ascertained at trial.

Third Cause of Action
Violence Against Women

73. Plaintiffs incorporate by reference paragraphs 1 through 72 of this Complaint as if set forth herein.

74. Defendants committed, or acted in concert to commit, or Defendants' co-venturers or agents committed acts against Plaintiff Jane Doe I of physical and psychological violence against women because of her gender, including sexual violence, thus violating her right to be free from torture and her right to equality, liberty and security of person, equal protection under the law, and the right to be free from all forms of discrimination.

75. The acts described herein constitute violations of the law of nations, customary international law, and worldwide industry standards and practices, including, but not limited to, the specific laws, agreements, conventions, resolutions and treaties listed in paragraph 59, *supra*. The acts described herein are actionable under both the ATCA and the TVPA. In acting together with the TNI security forces of the Government of Indonesia, Defendants acted under color of law.

76. Defendants' conduct in violation of the law of nations, customary international law, and worldwide industry standards and practices, including, but not limited to, the specific laws, agreements, conventions, resolutions and treaties listed in paragraph 59, *supra*, has caused Plaintiff Jane Doe I significant injury. Defendants are jointly and severally liable for the acts of any co-venturers in the project that are in violation of the law of nations, customary international law, and worldwide industry standards and practices, including, but not limited to, the specific laws, agreements, conventions, resolutions and treaties listed in paragraph 59, *supra*. Defendants are also vicariously liable for any violations of their

agents of the law of nations, customary international law, and worldwide industry standards and practices, including, but not limited to, the specific laws, agreements, conventions, resolutions and treaties listed in paragraph 59, *supra*. Plaintiff Jane Doe I is entitled to injunctive relief and to recover compensatory and punitive damages in amounts to be ascertained at trial.

Fourth Cause of Action
Wrongful Death

77. Plaintiffs incorporate by reference paragraphs 1 through 76 of this Complaint as if set forth herein.

78. Defendants committed, or acted in concert to commit, or Defendants' co-venturers or agents committed acts that constitute wrongful death under the laws of the District of Columbia, the laws of the United States and the laws of Indonesia, and that caused the deaths of the husbands of Plaintiffs Jane Doe II, Jane Doe III and Jane Doe IV. Plaintiffs Jane Doe II, Jane Doe III and Jane Doe IV are the heirs at law for their deceased husbands. Plaintiffs Jane Doe II, Jane Doe III and Jane Doe IV have sustained pecuniary loss resulting from loss of society, comfort, attention, services and support of their deceased husbands.

79. Defendants' actions and omissions were a direct and substantial cause of the deaths of the husbands of Plaintiffs Jane Doe II, Jane Doe III, and Jane Doe IV. Defendants failed to use due care to protect them from injury and harm, thereby proximately causing their wrongful deaths. Plaintiffs Jane Doe II, Jane Doe III and Jane Doe IV are entitled to recover compensatory and punitive damages in amounts to be ascertained at trial.

Fifth Cause of Action
Battery

80. Plaintiffs incorporate by reference paragraphs 1 through 79 of this Complaint as if set forth herein.

81. Defendants committed, or acted in concert to commit, or Defendants' co-venturers or agents committed acts which resulted in harmful or offensive contact with the bodies of Plaintiffs John Does I, II, III, IV, V, VI, VII, and Jane Doe I. Plaintiffs did not consent to the contact, which caused injury, damage, loss and harm to Plaintiffs John Does I, II, III, IV, V, VI, VII, and Jane Doe I.

82. The acts described herein constitute battery, actionable under the laws of the District of Columbia, the laws of the United States and the laws of Indonesia.

Sixth Cause of Action
Assault

83. Plaintiffs incorporate by reference paragraphs 1 through 82 of this Complaint as if set forth herein.

84. Defendants committed, or acted in concert to commit, or Defendants' co-venturers or agents committed acts which caused Plaintiffs John Does I, II, III, IV, V, VI, VII, and Jane Doe I to be apprehensive that Defendants would subject them to imminent batteries and/or intentional invasions of their rights to be free from offensive and harmful contact, and said conduct demonstrated that Defendants had a present ability to subject Plaintiffs to an immediate, intentional, offensive and harmful touching. Plaintiffs did not consent to such conduct, which caused injury, damage, loss and harm to Plaintiffs John Does I, II, III, IV, V, VI, VII, and Jane Doe I.

85. The acts described herein constitute assault, actionable under the laws of the District of Columbia, the laws of the United States and the laws of Indonesia.

Seventh Cause of Action
Arbitrary Arrest and Detention

86. Plaintiffs incorporate by reference paragraphs 1 through 85 of this Complaint as if set forth herein.

87. Defendants committed, or acted in concert to commit, or Defendants' co-venturers or agents committed acts which caused Plaintiffs John Does I, II, III, IV, V, VI, and VII to be arrested and detained. Such arrest and detention of Plaintiffs was illegal and unjust, carried out without a warrant, probable cause, reasonable suspicion or notice of charges.

88. Plaintiffs John Does I, II, III, IV, V, VI, and VII were placed in fear for their lives, were deprived of their freedom, separated from their families and forced to suffer severe physical and mental abuse. Plaintiffs did not consent to such conduct, which caused injury, damage, loss and harm to Plaintiffs John Does I, II, III, IV, V, VI, and VII.

89. The acts described herein constitute arbitrary arrest and detention, actionable under the laws of the District of Columbia, and the laws of the United States.

Eighth Cause of Action
False Imprisonment

90. Plaintiffs incorporate by reference paragraphs 1 through 89 of this Complaint as if set forth herein.

91. Defendants committed, or acted in concert to commit, or Defendants' co-venturers or agents committed acts to unlawfully exercise force or the express or implied threat of force to restrain, detain or confine Plaintiffs Jane Doe I, John Does I, II, III, IV, V, VI, and VII. The restraint, detention or confinement compelled Plaintiffs to stay or go somewhere against their will for some appreciable time.

92. Plaintiffs Jane Doe I, John Does I, II, III, IV, V, VI, and VII were placed in fear for their lives, were deprived of their freedom, separated from their families and forced to

suffer severe physical and mental abuse. Plaintiffs did not consent to such conduct, which caused injury, damage, loss and harm to them.

93. The acts described herein constitute false imprisonment, actionable under the laws of District of Columbia, and the laws of the United States.

Ninth Cause of Action
Intentional Infliction of Emotional Distress

94. Plaintiffs incorporate by reference paragraphs 1 through 93 of this Complaint as if set forth herein.

95. The acts described herein constitute outrageous conduct against Plaintiffs Jane Doe I, John Does I, II, III, IV, V, VI, and VII, and were without privilege.

96. Defendants committed, or acted in concert to commit, or Defendants' co-venturers or agents committed acts which intended to cause Plaintiffs to suffer emotional distress. In the alternative, Defendants engaged in the conduct with reckless disregard of the probability of causing Plaintiffs to suffer emotional distress, Plaintiffs were present at the time the outrageous conduct occurred, and Defendants knew that the Plaintiffs were present.

97. Plaintiffs suffered severe emotional distress and the outrageous conduct of Defendants was a cause of the emotional distress suffered by Plaintiffs.

98. Defendants' outrageous conduct constitutes the intentional infliction of emotional distress and is actionable under the laws of the District of Columbia, and the laws of the United States.

Tenth Cause of Action
Negligent Infliction of Emotional Distress

99. Plaintiffs incorporate by reference paragraphs 1 through 98 of this Complaint as if set forth herein.

100. At all relevant times, Defendants, and each of them, owed Plaintiffs a duty to act with reasonable care, and at all relevant times, harm and/or injury to the Plaintiffs was reasonably foreseeable if such duty of care was breached.

101. At all relevant times, Defendants, and each of them, had the power, ability, authority and duty to stop engaging in the conduct described herein and to intervene to prevent or prohibit such conduct.

102. At all relevant times, Defendants, and each of them, knew, or reasonably should have known, that the conduct described herein would and did proximately result in physical and emotional distress to Plaintiffs.

103. Despite said knowledge, power, and duty, Defendants, and each of them, breached their duty to Plaintiffs, and thereby negligently failed to act so as to stop engaging in the conduct described herein and to prevent or to prohibit such conduct or to otherwise protect Plaintiffs. To the extent that said negligent conduct was perpetrated by certain Defendants, and each of them, the remaining Defendants confirmed and ratified said conduct with the knowledge that Plaintiffs' emotional and physical distress would thereby increase and with a wanton and reckless disregard for the deleterious consequences to Plaintiffs.

104. Plaintiffs Jane Doe II and IV were bystanders and immediately observed the circumstances of the murders of their husbands.

105. As a direct and legal result of Defendants' wrongful acts, Plaintiffs have suffered and will continue to suffer significant physical injury, pain and suffering and extreme and severe mental anguish and emotional distress.

106. Defendants' conduct constitutes the negligent infliction of emotional distress and is actionable under the laws of the District of Columbia, and the laws of the United States.

Eleventh Cause of Action
Negligence Per Se

107. Plaintiffs incorporate by reference paragraphs 1 through 106 of this Complaint as if set forth herein.

108. Defendants failed to use ordinary or reasonable care in order to avoid injury to the Plaintiffs. Defendants' negligence was a cause of injury, damage, loss and harm to Plaintiffs.

109. As a result of these acts, Plaintiffs suffered harm including, but not limited to, physical harm, pain and suffering, and severe emotional distress. Defendants' conduct constitutes negligence and is actionable under the laws of the District of Columbia, the United States, Indonesia, the law of nations, customary international law, and worldwide industry standards and practices, including, but not limited to, the specific laws, agreements, conventions, resolutions and treaties listed in paragraph 59, *supra*.

Twelfth Cause of Action
Negligent Hiring

110. Plaintiffs incorporate by reference paragraphs 1 through 109 of this Complaint as if set forth herein.

111. On information and belief, Plaintiffs allege that Defendants selected, hired, retained and contracted with TNI military, intelligence and/or police forces and/or the other joint venturers to perform work and provide security for the Arun Project.

112. Defendants failed to exercise reasonable care in selecting, hiring, retaining and contracting with TNI military, intelligence and/or police forces and/or the other joint venturers to perform this work. At the time that Defendants selected, hired, retained and contracted with TNI military, intelligence and/or police forces and/or the other joint venturers and at all other relevant times, Defendants knew or reasonably should have known that TNI military, intelligence

and/or police forces and/or the other joint venturers would violate Plaintiffs' rights and that, as a direct and proximate result of those violations, Plaintiffs would suffer injuries as alleged herein. Defendants' conduct constitutes negligence per se and is actionable under the laws of the District of Columbia, and the laws of the United States.

113. As a direct and proximate result of Defendants' negligent selection, hiring, retention and contracting with TNI military, intelligence and/or police forces and/or the other joint venturers, Plaintiffs have suffered and continue to suffer injuries entitling them to damages in amounts to be proven at trial.

Thirteenth Cause of Action
Negligent Supervision

114. Plaintiffs incorporate by reference paragraphs 1 through 113 of this Complaint as if set forth herein.

115. When engaging in the wrongful conduct alleged herein, the TNI military, intelligence and/or police forces and/or the other joint venturers were acting as the agents of Defendants. Defendants exercised control over the operative details of the security services provided by the TNI military, intelligence and/or police forces and/or the other joint venturers.

116. Defendants knew or reasonably should have known that the TNI military, intelligence and/or police forces and/or the other joint venturers would violate Plaintiffs' rights, and that, as a direct and proximate result of those violations, Plaintiffs would suffer injuries as alleged herein.

117. Defendants had the authority to supervise, prohibit, control, and/or regulate the TNI military, intelligence and/or police forces and/or the other joint venturers so as to prevent these acts and omissions from occurring. Defendants also had the ability to cease production until such time as the violations alleged herein were stopped and/or prevented.

118. Defendants knew or reasonably should have known unless they intervened to protect Plaintiffs and properly to supervise, prohibit, control and/or regulate the conduct described herein, the TNI military, intelligence and/or police forces and/or the other joint venturers would perceive their acts and omissions as being ratified and condoned.

119. Defendants failed to exercise due care by failing to supervise, prohibit, control or regulate the TNI military, intelligence and/or police forces and/or the other joint venturers. Defendants' conduct constitutes negligent supervision and is actionable under the laws of the District of Columbia, and the laws of the United States. As a direct and proximate result of Defendants' negligent selection, hiring, retention and contracting with the TNI military, intelligence and/or police forces and/or the other joint venturers, Plaintiffs have suffered and continue to suffer injuries entitling them to damages in amounts to be proven at trial.

Fourteenth Cause of Action
Conversion

120. Plaintiffs incorporate by reference paragraphs 1 through 119 of this Complaint as if set forth herein.

121. As part of the scorched earth practices of Defendants' TNI security forces, homes of villagers near the Arun Project were routinely and systematically burned and destroyed. Defendants committed, or acted in concert to commit, or Defendants' co-venturers or agents committed acts or omissions that resulted in the homes of John Doe II and John Doe V being burnt and destroyed.

122. Defendants thereby deprived Plaintiffs John Doe II and John Doe V of property by wrongful acts and disposition as alleged above. At the time of the conversion, Plaintiffs John Doe II and John Doe V owned and/or possessed the property.

123. Defendants' conduct constitutes conversion and is actionable under the laws of the District of Columbia, and the laws of the United States. As a result of Defendants' conversion of Plaintiffs' property, John Doe II and John Doe V were damaged by the loss and/or the loss of the use of their property in an amount to be proven at trial.

Fifteenth Cause of Action
Aiding and Abetting

124. Plaintiffs incorporate by reference paragraphs 1 through 123 of this Complaint as if set forth herein.

125. Defendants knowingly provided substantial assistance to the Indonesian military units that committed the wrongful acts delineated in the preceding fourteen causes of action at ¶¶ 63-123 at the time such wrongful acts were perpetrated.

126. Defendants' aiding and abetting the Indonesian military units' wrongful acts delineated in the preceding fourteen causes of action at ¶¶ 63-123 is actionable under the laws of the District of Columbia.

IX. DEMAND FOR JURY TRIAL

127. Plaintiffs demand a trial by jury on all issues so triable.

X. PRAYER FOR RELIEF

WHEREFORE, Plaintiffs respectfully request the Court to:

(a) enter judgment in favor of Plaintiffs on all counts of the Complaint;

(b) declare that Defendants have violated Plaintiffs' human rights and the laws of the State of District of Columbia and the United States, as set forth herein;

(c) award Plaintiffs compensatory and punitive damages;

(d) grant Plaintiffs equitable relief, permanently enjoining Defendants from further engaging in human rights abuses against Plaintiffs and their fellow villagers in complicity with the Indonesian Government and military;

(e) award Plaintiffs the costs of suit including reasonable attorneys' fees, and

(f) award Plaintiffs such other and further relief as the Court deems just under the circumstances.

Respectfully submitted this 11th day of June, 2001,

/s/ Terry Collingsworth
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NATACHA THYS
INTERNATIONAL LABOR
RIGHTS FUND
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/s/ Edward M. Gleason, Jr.
ROBERT STROPP, JR.
DC Bar No. 429737
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ATTORNEYS FOR PLAINTIFFS

APPENDIX M

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 1:01cv1357 (LFO)

JOHN DOE I, *et al.*,

Plaintiff,

v.

EXXON MOBIL CORPORATION, *et al.*,

Defendants.

AMICUS CURIAE UNITED STATES' STATEMENT OF INTEREST

In response to the Court's request of May 10, 2002, and pursuant to 28 U.S.C. § 517, *Amicus Curiae* United States hereby submits as a statement of interest in this litigation a letter from U.S. Department of State Legal Adviser William H. Taft, IV, to the Honorable Louis F. Oberdorfer. The letter is attached hereto as Exhibit A.

Respectfully submitted,

/s/ Roscoe C. Howard, Jr.
ROSCOE C. HOWARD, JR., D.C. Bar #246470
United States Attorney

/s/ Mark E. Nagle
MARK E. NAGLE, D.C. Bar #416364
Assistant United States Attorney

/s/ Stratton C. Strand
STRATTRON C. STRAND, D.C. Bar #464992
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U.S. Department of State
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Room 5527
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THE LEGAL ADVISER
DEPARTMENT OF STATE
WASHINGTON

July 29, 2002

Honorable Louis F. Oberdorfer
United States District Court for
The District of Columbia
333 Constitution Ave., NW
Washington, D.C. 20001

Re: *Doe, et al. v. ExxonMobil, et al.* No. 01-CV-1357 (DDC)

Dear Judge Oberdorfer:

This is in response to your letter of May 10, in which you invite the views of the Department of State in connection with the above-captioned proceedings. Specifically, you inquire "whether the Department of State has an opinion (non-binding) as to whether adjudication of this case at this time would impact adversely on interests of the United States, and, if so, the nature and significance of that impact." As you requested, this letter specifically addresses the potential adverse impacts of the litigation on U.S. interests. It does not address the legal issues before the court.

For the reasons detailed below, the Department of State believes that adjudication of this lawsuit at this time would in fact risk a potentially serious adverse impact on significant interests of the United States, including interests related directly to the on-going struggle against international terrorism. It may also diminish our ability to work with the Government of Indonesia ("GOI") on a variety of important programs, including efforts to promote human rights in Indonesia.

However, before describing those concerns, the Department would like to reaffirm its condemnation of human rights abuses by elements of the Indonesian armed forces in

locations such as Aceh. Without expressing a view on the allegations in this specific lawsuit, we would like to reiterate that a lasting, peaceful solution to the Aceh conflict that maintains Indonesian sovereignty can only be achieved if the military and police end human rights abuses. The Department will continue to work vigorously to bring such abuses to an end through diplomatic and other means.

With respect to this litigation, it is the Department's considered opinion that adjudication at this time could adversely affect United States interests in two ways, recognizing that such effects cannot be determined with certainty.[1] First, the GOI may respond to the litigation by curtailing cooperation with the United States on issues of substantial importance to the United States. Second, the litigation's potential effects on Indonesia's economy could in turn adversely affect important United States interests.

Potential Bilateral Effects

In our experience, the government and people of Indonesia react most negatively to any perceived intrusion into areas of Indonesian sovereignty. We anticipate that adjudication of this case will be perceived in Indonesia as a U.S. court trying the GOI for its conduct of a civil war in Aceh. All of the human rights abuses and injuries alleged in the complaint

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[1] Much of this assessment is necessarily predictive and contingent on how the case might unfold in the course of litigation. E.g., the nature, extent, and intrusiveness of discovery; the degree to which the case might directly implicate matters of great sensitivity to the Government of Indonesia and call for judicial pronouncements on the official actions of the GOI with respect to the conduct of its military activities in Aceh; the effect that a decision in favor of plaintiffs might encourage secessionist activities in Aceh and elsewhere in Indonesia; whether the case were to go to a jury and, if so, whether a substantial monetary award were to be imposed on Exxon Mobil; how other large commercial interests might interpret such a judgment when making investment decisions in Indonesia.

refer to conduct claimed to have been committed by the military and police forces of the GOI. This issue presents special sensitivities for Indonesia because it is deeply concerned about maintaining national cohesion in the face of strong anti-government secessionist movements in Aceh and elsewhere. The Indonesian response to such perceived U.S. "interference" in its internal affairs could impair cooperation with the U.S. across the full spectrum of diplomatic initiatives, including counterterrorism, military and police reform, and economic and judicial reform.

This lawsuit could potentially disrupt the on-going and extensive United States efforts to secure Indonesia's cooperation in the fight against international terrorist activity. Indonesia is the fourth largest state in the world, with a population of some 210 million. It is also the largest Muslim nation, and serves as a focal point for U.S. initiatives in the ongoing war against Al Qaida and other dangerous terrorist organizations. U.S. counterterrorism initiatives could be imperiled in numerous ways if Indonesia and its officials curtailed cooperation in response to perceived disrespect for its sovereign interests.

The United States also is actively seeking to assist Indonesia in reform efforts aimed at ending the kinds of abuses alleged in this litigation. Through improved training and support of security personnel, as well as judicial reform, these programs are designed to establish a higher degree of professionalism and respect for individual rights. Should the GOI withdraw from these programs in reaction to the litigation, it will impact adversely on our goal of improving Indonesia's treatment of all members of its population, including the people of Aceh. An adverse effect on our human rights objectives is also possible if the GOI were to turn down U.S. companies bidding for new contracts in response to the suit. Working side-by-aide with U.S. firms, Indonesian companies and government agencies see the

advantages of modern business practices including transparency, respect for contracts, fair labor practices, anti-corruption, efficiency, and competitiveness. We would expect that foreign companies, such as from the People's Republic of China (CNOOC and PetroChina both acquired multi-million dollar rights to Indonesian oil and gas fields this year), would be far less concerned about human right abuses, or about upholding best business practices.

Potential Effects on Indonesia's Stability

Economic and political stability in Indonesia is important to U.S. interests in the region. Given Indonesia's large population, resources, key geographic location, and proximity to key U.S. allies, instability there could create problems ranging from interruption in vital shipping lanes, to refugee outflows, to a new home for terrorists. To the extent this litigation contributes to a worsening of the economic conditions in Indonesia that breed instability it would adversely affect U.S. interests.

Here, timing is an important consideration, because there is already substantial evidence that Indonesia's foreign investment climate is deteriorating. The GOI's Investment Coordinating Board (BKPM), for example, reported that foreign direct investment approvals dropped 88 percent in the first quarter of 2002 (US$ 291.5 million) compared to the first quarter of 2001 (US$ 2.44 billion). Total BKPM foreign direct investment approvals for 2001 also dropped 41.5 percent from the previous year. While the dollar value of investment proposals may be inflated and many proposals do not necessarily result in actual projects, the magnitude of the change confirms that the underlying trend is worsening.

This litigation appears likely to further discourage foreign investment, particularly in extractive industries in remote or unstable areas that require security protection. This, in turn, could have decidedly negative consequences for the Indones-

ian economy. Revenues from the oil and gas sector, for example, are one of the core contributors to GOI budget revenues, comprising 35 percent of the Indonesian Government's total revenues in 2001. In the last few years, oil and gas revenues (including taxes on the sector) have become an increasingly important source of government funds, comprising 19, 23, and 31 percent of total government revenue respectively in 1998, 1999, and 2000. In addition, oil and gas revenues, which are received in U.S. dollars, offer important protection for the GOI from foreign exchange risk. However, in order to maintain its current level of revenues from the sector, Indonesia must develop new fields, or invest further to maintain production at existing oil and gas fields. More generally, Indonesia must maintain a growing economy to deal with the effects of the 1997-98 financial crisis, which left the GOI with the costs of a Rp 660 trillion (US$ 75 billion) bank bailout. Efforts by the U.S. and other donors to enhance Indonesia's fiscal sustainability through debt rescheduling and international lending programs will be undermined if Indonesia cannot sustain its own commitments.

A viable, well-funded central government is also important to U.S. interests in domestic Indonesian policies. Providing more and higher quality public services, especially education and health services, is a key factor in reducing poverty and maintaining political stability. Given its size and large population, any threat to Indonesia's political stability could impact on the security of U.S. treaty allies Australia and Thailand, as well as other countries in the region. Adequate government resources are also necessary to maintain properly trained and equipped security forces that do not need to rely on unregulated and often corrupt business dealings, practices which contribute to actions outside of a central chain of command. Professional personnel are also crucial for making progress on a host of U.S. priorities, including promoting regional stability, countering ethnic and sectarian violence, combating piracy, trafficking of persons, smuggling, nar-

cotics trafficking, and environmentally unsustainable levels of fishing and logging. Litigation in the U.S. that discourages further investment in Indonesia poses a risk of weakening the Indonesian economy in conflict with these U.S. goals.

In this respect, we note that increasing opportunities for U.S. business abroad is an important aspect of U.S. foreign policy. Under the circumstances presented here, the adjudication of these claims could prejudice the Government of Indonesia and Indonesian businesses against U.S. firms bidding on contracts in extractive and other industries.

For the information of the Court, I am enclosing a copy of a letter received on July 15, 2002, from Indonesia's Ambassador to the United States Soemadi Djoko M. Brotodiningrat to Deputy Secretary of State Richard Armitage. In the letter Ambassador Soemadi expresses his government's objections to the continued adjudication of this case. He states that Indonesia views this litigation as an unacceptable extraterritorial act that will complicate efforts to safeguard foreign investors and will negatively impact Indonesia's struggle to secure economic recovery. He also states that the case will have an adverse impact on effort towards peace in Aceh, which is at an extremely sensitive stage.

Sincerely,

/s/ William H. Taft, IV
WILLIAM H. TAFT, IV
The Legal Adviser

Enclosure:
Letter from Indonesia Ambassador

KEDUTAAN BESAR REPUBLIK INDONESIA
EMBASSY OF THE REPUBLIC OF INDONESIA
WASHINGTON, D.C. 20036

CHANCERY
2020 MASSACHUSETTS AVENUE, N.W.
TELEPHONE (202) 775-5200

THE AMBASSADOR

Washington, D.C. 15 July 2002

Excellency,

I have the honour to draw your attention to the lawsuit filed in the United States District Court for the District of Columbia on June 19, 2001 against Exxon Mobil Corpora-tion, Civ. No. 01-1357 (LFO).

While fully respecting the United States sovereignty over its judiciary, I feel nevertheless obliged to express my concern should the above-mentioned lawsuit be adjudicated, for the following reasons:

1. As a matter of principle, we cannot accept the extra territorial jurisdiction of a United States Court over an allegation against an Indonesian government institution, eq the Indonesian military, for operations taking place in Indonesia.

2. While allegation of abuses of human rights by the Indonesian military against the separatist Free Aceh movement is at best questionable, its adjudication in the United States court will definitely compromise the serious efforts of the Indonesian government to guarantee the safety of foreign investments, including in particular those from the United States, and thus will adversely affect Indonesia's struggle to secure economic recovery, a struggle which is supported by the United States.

3. The adjudication of the above-mentioned lawsuit will also have an adverse impact on the process to find a peaceful and satisfactory solution on the problem of Aceh, which is currently at an extremely sensitive and delicate stage, a process which is also of interest to the United States.

I would highly appreciate your kind consideration on the points I raised should you be seized with the matter.

Please accept, Excellency, the assurances of my highest consideration.

/s/ Soemadi D.M. Brotodiningrat
SOEMADI D.M. BROTODININGRAT
Ambassador

The Honorable
Richard L. Armitage
Deputy Secretary of State
The Department of State
Washington, D.C.

APPENDIX N

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

1-01-CV-1357-LFO

JOHN DOE I, *et al.*,

Plaintiffs,

v.

EXXON MOBIL CORP., *et al.*,

Defendant.

SUPPLEMENTAL STATEMENT OF INTEREST OF THE UNITED STATES OF AMERICA

Pursuant to 28 U.S.C. § 517, the United States respectfully submits this supplemental statement of interest concerning plaintiffs' claims under the Alien Tort Statute.

PRELIMINARY STATEMENT

In this action, plaintiffs seek to assert claims under the Alien Tort Statute, 28 U.S.C. § 1350 ("ATS"), for alleged human rights abuses by security forces in Indonesia. On May 10, 2002, this Court inquired whether "the Department of State has an opinion (non-binding) as to whether adjudication of this case at this time would impact adversely on interests of the United States, and, if so, the nature and significance of that impact." On August 1, 2002, the United States responded by submitting a letter from the State Department. *See* Dkt. 38, Exhibit A. The State Department letter explained that "adjudication of this lawsuit at this time would in fact risk a potentially serious adverse impact on significant interests of the United States, including interests related directly to the on-going struggle against international terrorism." *See* Dkt.

38, Exhibit A, at 1. Because the Court had requested only policy input from the State Department, the State Department's letter specifically did not address the legal issues before the Court. *Ibid.*

The United States is cognizant of the limited scope of the Court's prior request. The lay of the land, however, recently has changed. On May 8, 2003, the United States filed an *amicus curiae* brief in a Ninth Circuit *en banc* case, *Doe I* v. *Unocal Corp.*, Nos. 00-56603, 00-56628. In that brief, the United States asked the Court of Appeals to overrule its prior precedent reading the ATS as providing a cause of action. The brief explained that the ATS is solely a grant of jurisdiction, and that it does not provide a cause of action.

There is no controlling D.C. Circuit precedent on this threshold issue. Recent Supreme Court precedent, however, and a recent decision by the D.C. Circuit on a closely related issue, militate strongly against finding an implied private right of action in the mere jurisdictional grant provided by the ATS. Moreover, it would be contrary to the long-established presumption against extraterritorial application of a statute for the Court to construe the ATS as applying to conduct occurring wholly within the boundaries of other nations.

It remains the United States' position that adjudication of this case would raise foreign policy and national security concerns for the reasons articulated in the State Department's letter. Those concerns can be avoided by holding, as the United States contends, that the ATS does not create an independent right of action. Given the substantial interest of the United States in the proper construction and application of the ATS, the United States respectfully submits this Supplemental Statement of Interest explaining why plaintiffs' claims under the ATS should be rejected as a matter of law.

ARGUMENT

I. THE ATS DOES NOT PROVIDE A CAUSE OF ACTION AND DOES NOT PERMIT A COURT TO INFER A CAUSE OF ACTION TO ENFORCE INTERNATIONAL LAW NORMS DISCERNED BY THE COURTS FROM DOCUMENTS SUCH AS UNRATIFIED AND NON-SELF-EXECUTING TREATIES, AND NON-BINDING RESOLUTIONS.

A. The ATS Is Merely A Jurisdictional Provision.

1. a. It is a fundamental mistake to read the ATS as anything but a jurisdictional provision. *See* Casto, *The Federal Courts' Protective Jurisdiction over Torts Committed in Violation of the Law of Nations*, 18 Conn. L. Rev. 467, 479-480 (1986) ("any suggestion that the statute creates a federal cause of action is simply frivolous"). Congress passed this statute as part of the Judiciary Act of 1789. As slightly revised today, the ATS provides:

> [T]he district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States.

28 U.S.C. § 1350. "The debates that led to the [Judiciary] Act's passage contain no reference to the Alien Tort Statute, and there is no direct evidence of what the First Congress intended it to accomplish." *Trajano* v. *Marcos*, 978 F.2d 493, 498 (9th Cir. 1992).

This jurisdictional statute remained virtually dormant for almost 200 years, until the Second Circuit, in 1980, for the first time gave it an expansive construction. *See Filartiga* v. *Pena-Irala*, 630 F.2d 876 (2d Cir. 1980). That court held that the ATS conferred subject-matter jurisdiction on federal courts to hear a dispute between citizens of Paraguay

regarding torture allegedly committed in Paraguay. The court did not opine, however, on whether the ATS itself provided a cause of action.

b. Thereafter, in *Tel-Oren* v. *Libyan Arab Republic*, 726 F.2d 774 (D.C. Cir.), *cert. denied*, 470 U.S. 1003 (1984), in separate opinions, both Judges Bork and Robb disagreed with *Filartiga* insofar as it allowed such a suit to proceed.[1] *Tel-Oren* involved the claims of survivors and relatives of persons murdered and injured by a terrorist attack in Israel by the PLO. The victims brought their claim in the District of Columbia, relying on the ATS. In affirming the dismissal of the ATS claims, Judge Bork explained that § 1350 was only a jurisdictional statute and did not provide the plaintiffs a cause of action or a substantive right to sue. *Id.* at 801-811 (Bork, J.). Judge Bork further explained that neither the treaties cited by plaintiffs in that case, nor international law by itself, provided the plaintiffs a cause of action. *Id.* at 816. Judge Bork observed, "[w]hat little relevant historical background is now available to us indicates that those who drafted the Constitution and the Judiciary Act of 1789 wanted to open federal courts to aliens for the purpose of avoiding, not provoking, conflicts with other nations * * *. A broad reading of section 1350 runs directly contrary to that desire." *Id.* at 812. *See also id* at 816 ("[a]djudication of international disputes of this sort in federal courts, disputes over international violence occurring abroad, would be far more likely to exacerbate tensions with other nations than to promote peaceful relations").

Judge Robb did not reach the question of whether the ATS provided a cause of action. Rather, he rejected the claims as nonjusticiable, stating that the Second Circuit's approach was

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[1] Judge Edwards wrote a separate opinion supporting dismissal of the ATS claim. He agreed with *Filartiga*, but believed that a torture claim could only be asserted against a state actor. *Id.* at 777-798.

"fundamentally at odds with the reality of the international structure and with the role of United States courts within that structure." *Id.* at 826 n.5 (Robb, J.).

c. In *Trajano*, however, the Ninth Circuit held that a court in an ATS action could define and enforce the law of nations as part of its common law powers. *See Trajano*, 978 F.2d at 499-502. Three years later in, *Hilao* v. *Estate of Marcos*, 25 F.3d 1467, 1474-76 (9th Cir. 1994), *cert. denied*, 513 U.S. 1126 (1995), that Court expressly held for the first time that the ATS itself created a cause of action to enforce the "law of nations." The Ninth Circuit misread *Filartiga* as having so held,[2] and simply followed *Filartiga* without independently examining the question.[3]

d. Recently, the D.C. Circuit rejected ATS claims asserted against the United States on behalf of aliens detained at the U.S. Naval Base at Guantanamo Ray. *See Al Odah* v. *United States*, 321 F.3d 1134, 1144-1145 (D.C. Cir. 2003). The Court held that, under *Johnson* v. *Eisentrager*, 399 U.S. 763 (1950), aliens outside the United States had no right to sue in U.S. Courts regarding their detention. In a separate concurring opinion, Judge Randolph explained that the ATS provides the courts with jurisdiction, but does not confer a cause of action.[4] Judge Randolph explained that, under the U.S. Constitution, "Congress — not the Judiciary — is to deter-

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[2] *See Filartiga* v. *Pena-Irala*, 577 F. Supp. 860 (E.D.N.Y. 1984) ("We must now face the issue left open by the Court of Appeals, namely, the nature of the 'action' over which [the ATS] affords jurisdiction").

[3] The Eleventh Circuit thereafter held that the ATS "establishes a federal forum where courts may fashion domestic common law remedies to give effect to violations of customary international law." *Abebe-Jira* v. *Negewo*, 72 F.3d 844 (11th Cir. 1996).

[4] Although Judges Garland and Williams did not join Judge Randolph's concurring opinion, "they d[id] not intend thereby to express any view about its reasoning. They believe[d] the issues addressed need not be reached." *Al Odah*, 321 F.3d at 1145 n*.

mine, through legislation, what international law is and what violations of it ought to be cognizable in the courts." *Al Odah*, 321 F.3d at 1147 (Randolph, J., concurring). Moreover, Judge Randolph observed that, "[t]o hold that the [ATS] creates a cause of action for treaty violations, as the *Filartiga* decisions indicate, would be to grant aliens greater rights in the nation's courts than American citizens enjoy. Treaties do not generally create rights privately enforceable in the courts. Without authorizing legislation, individuals may sue for treaty violations only if the treaty is self-executing." *Id.* at 1146.

2. Judges Bork and Randolph were correct. By its terms, the ATS vests federal courts with "original jurisdiction" over a particular type of action; it does not purport to *create* any private cause of action. An examination of the Judiciary Act of 1789 strongly supports that view. That Act in Sections 1 through 13 establishes the federal courts and delineates the jurisdiction of those courts. The ATS is set out in Section 9, adjacent to provisions establishing jurisdiction over crimes on the high seas, admiralty issues, and suits against consuls. *See* 1 Stat. 76 (1789). In context, the ATS is thus properly read as being solely a jurisdictional provision. *See* Ford, THE WORKS OF THOMAS JEFFERSON IN TWELVE VOLUMES, *Thomas Jefferson Papers Series 1. General Correspondence* (Dec. 3, 1792 Jefferson letter citing the "act of 1789, chapter 20, section 9" as a statute "describing the *jurisdiction of the Courts*") (emphasis added) (available at http://memory.loc.gov/ammem/mtjhtml/mtjhome.html); *cf. Montana-Dakota Co.* v. *Northwestern Pub. Serv.*, 341 U.S. 246, 249 (1951) ("The Judicial Code, in vesting jurisdiction in the District Courts, does not create causes of action, but only confers jurisdiction to adjudicate those arising from other sources").

Although there is no direct legislative history regarding the ATS, many scholars agree that Congress passed this jurisdictional provision, in part, in response to two high profile

incidents of the time concerning assaults upon foreign ambassadors on domestic soil (*Respublica* v. *De Longchamps*, 1 U.S. (1 Dall.) 111 (1784); *Report of Secretary for Foreign Affairs on Complaint of Minister of United Netherlands*, 34 J.Cont. Cong. 109, 111 (1788)). *See, e.g.*, Casto, 18 Conn. L. Rev. at 488-498. These two cases raised serious questions of whether the then-new federal institutions would be adequate to avoid international incidents that could arise if such matters were left to the state courts. *Id.* at 490-494.

At the time, "denial of justice" to one's own citizens abroad was a justification for a country to launch a war of reprisal. E. De Vattel, THE LAW OF NATIONS, bk. II, ch. XVIII, §350, at 230- 231 (Carnegie ed. trans. Fenwick 1916) (1758 ed.). For example, Edmund Randolph commented that, without an adequate federal forum, "[i]f the rights of an ambassador be invaded by any citizen it is only in a few States that any laws exist to punish the offender." Letter from Edmund Randolph, Governor, Virginia, to the Honorable Speaker of the House of Delegates (Oct. 10, 1787). James Madison also feared the country's inability to "prevent those violations of the law of nations & of treaties which if not prevented must involve us in the calamities of foreign wars." 1 M. Farrand, RECORDS OF THE FEDERAL CONVENTION, 316 (1911). Notably, the protection of ambassadors is one of the three classic protections afforded by the law of nations, as given effect in domestic law. William Blackstone explained that "[t]he principal offences against the law of nations as animadverted upon by the municipal laws of England are of three kinds; 1. Violation of safe-conducts; 2. Infringement of the rights of ambassadors; and, 3. Piracy." 4 W. Blackstone, COMMENTARIES, 67-68 (1783).

Article III jurisdiction is not self-vesting. Congress did not enact a general federal question statute until much later. The ATS, however, permitted the federal courts to hear one subset of "arising under" cases – *i.e.*, those arising under Acts of

Congress incorporating principles of the "law of nations" into the laws of the United States or under "treaties of the United States." In this way, the First Judiciary Act ensured that the federal courts would have jurisdiction over any claim brought by an ambassador, or other alien, seeking redress for a violation of such traditional law of nations protections. Then, the next year, invoking its constitutional authority to define and punish violations of the "Law of Nations," *see* Article I, Sec. 8, Cl. 10, Congress made assaults on ambassadors (as well as the two other traditional violations of the "law of nations" identified by Blackstone (piracy and violating the right of safe conduct)) offenses under the federal law. 1 Stat. 113-115, 117-118. Thus, the origins of the ATS are consistent with an understanding that it grants the federal courts subject matter jurisdiction over only those claims brought to enforce the "law of nations" insofar as that law has been affirmatively incorporated into the laws of the United States. The action of the First Congress, in adopting three traditional concepts from the Law of Nations into the positive law of the United States, demonstrates that Congress knows how to do so when it wishes, and that type of direct Congressional action is absent in the present case.

Under this understanding of the ATS (and Supreme Court jurisprudence regarding the recognition of causes of actions under federal law), *Congress* must enact a cause of action (or provide a basis for inferring a cause of action). Such causes of action would also fall within the present-day federal question jurisdiction (28 U.S.C. § 1331). While this interpretation may appear to render the ATS superfluous today, it would not have been so in 1789. General federal question jurisdiction was not enacted until nearly 100 years later, in 1875, and until 1980, that jurisdictional grant contained a minimum amount-in-controversy requirement. The courts have recognized that the elimination of the amount-in-controversy re-

quirement in 1980, rendered numerous jurisdictional provisions superfluous.[5]

Accordingly, although the ATS is somewhat of a historical relic today, that is no basis for transforming it, as plaintiffs suggest, into an untethered grant of authority to the courts to establish and enforce (through money damage actions) precepts of international law regarding disputes arising in foreign countries.

B. Neither The ATS Itself, Nor International Law Norms, Based On Documents Such As Unratified And Non-Self-Executing Treaties, And Non-Binding UN Resolutions, Provide Any Basis For Inferring A Cause Of Action.

1. International law does not generally provide causes of action enforceable in federal court. *See Tel-Oren*, 726 F.2d at 779 ("the law of nations consciously leaves the provision of rights of action up to the states") (Edwards, J., concurring); *id* at 810 (Bork, J., concurring). *See also* Christenson, *Federal Courts and World Civil Society*, 6 J. Transnat'l L & Policy 405, 511-512 (1997) ("U.S. courts will not incorporate a cause of action from customary international law"). Plaintiffs, however, ask this Court to read the ATS statute as itself providing an implied cause of action to enforce international law norms. Reading the ATS' grant of jurisdiction as a broad implied right of action cannot today be reconciled with the Supreme Court's repeated refusal in recent decisions to recognize implied private causes of action. *See, e.g., Alexander* v. *Sandoval*, 532 U.S. 275 (2001). As the Court emphasized in *Sandoval*, it has "sworn off the habit of venturing beyond Congress's intent" when it comes to recognizing implied private rights. *Sandoval*, 532 U.S. at 287. And the

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[5] *See, e.g., Erienet, Inc.* v. *Velocity Net, Inc.*, 156 F.3d 513, 520 (3rd Cir. 1998) (28 U.S.C. § 1337 superfluous); *Winstead* v. *J.C. Penney Co.*, 933 F.2d 576, 580 (7th Cir. 1991) (§§ 1337, 1340, and 1343 superfluous).

renunciation of that "habit" of inferring private causes of action applies equally to older statutes, such as the ATS. *Ibid.*

Under controlling Supreme Court precedent, a court must focus on whether the statute at issue has "'rights-creating' language." *Sandoval*, 532 U.S. at 288. The ATS is demonstrably a *jurisdiction*-vesting statute. Although it refers to a particular type of claim (*i.e.*, a "civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States"), it does not purport to create any particular statutory *rights*, much less rights that in turn could be interpreted to confer a private right of action for money damages. Thus, under the governing analysis established by the Supreme Court, it is plainly erroneous to construe the ATS itself as conferring a private cause of action.

2. Moreover, it is clearly improper to infer a cause of action when the documents relied upon by plaintiffs to discern norms of international law are not themselves intended by the Executive or Congress to create rights capable of domestic enforcement through legal actions by private parties.

Plaintiffs cite to the ruling of the Ninth Circuit to support the claimed violations of international law in this case of "unlawful detention, violence against women, and crimes against humanity." *See* Pl. Opp. to Motion to Dismiss 9-10. Although the Ninth Circuit has said that violations of international law "must be of a norm that is specific, universal, and obligatory" to be actionable under the ATS, *Hilao*, 25 F.3d at 1475, that Court has not actually applied those standards. Instead, it has found an implied right of action to enforce rights based upon international agreements that the United States has refused to join, *non*binding agreements, and agreements that are not self-executing,[6] as well as political

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[6] A self-executing treaty is one that does not require implementing legislation for its provisions to have effect in domestic law. Provisions in

resolutions of UN bodies and other non-binding statements. *See, e.g., Siderman de Blake* v. *Republic of Argentina*, 965 F.2d 699, 714-716 (9th Cir. 1991); *Martinez* v. *City of Los Angeles*, 141 F.3d 1373, 1383 (9th Cir. 1998); *Alvarez-Machain* v. *United States*, 331 F.3d 604, 620-623 (9th Cir. 2003) (en banc). None of these documents is "obligatory" in the sense that is critical for present purposes, because none in itself creates duties or rights enforceable by private parties in court. This Court should reject the Ninth Circuit's approach of transforming these non-binding, non-self-executing documents – none of which remotely creates a private cause of action – into sources of binding obligatory rights actionable in private suits for damages in federal court.

If the political Branches of the United States Government refuse to ratify a treaty, or regard a U.N. resolution as non-binding, or declare a treaty not to be self-executing, there obviously is no basis for a court to infer a cause of action to enforce the norms embodied in those materials. *See Al Odah*, 321 F.3d at 1148 (Randolph, J., concurring) (to enforce such agreements "is anti-democratic and at odds with principles of separation of powers"). As to treaties or conventions not ratified by the United States, it is clearly inappropriate for the courts to adopt and enforce principles contained in instruments that the President and/or the Senate have declined to embrace as binding on the United States, or enforceable as a matter of U.S. law through judicially-created causes of action. And, where a treaty is ratified but is not self-executing (as modern human rights treaties have been declared by the President and the Senate not to be), such a treaty neither creates a cause of action nor provides rules that a court may

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treaties and other international agreements are given effect as law in domestic courts of the United States only if they are "self-executing" or if they have been implemented by an act (such as an act of Congress) having the effect of federal law. *See Foster* v. *Neilson*, 27 U.S. (2 Pet.) 253, 314 (1829) (Marshall, C.J.).

properly enforce in a legal action brought by a private party. As the Supreme Court has held, a non-self-executing treaty "addresses itself to the political, not the judicial department; and the legislature must execute the [treaty] before it can become a rule for the Court." *Foster* v. *Neilson*, 27 U.S. (2 Pet.) at 314 (Marshall, C.J.). *See also* RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 111 cmt. h (1987) (emphasis added). Despite this established principle, the cases relied upon by plaintiffs base ATS claims on the International Covenant on Civil and Political Rights ("ICCPR"). *Martinez*, 141 F.3d at 1384; *Alvarez-Machain*,, 331 F.3d at 620-623. That treaty is non-self-executing, *see, e.g., Buell* v. *Mitchell*, 274 F.3d 337, 372 (6th Cir. 2001), and therefore clearly does not itself provide a private cause of action and cannot furnish a basis for a court to infer one.

Even where a treaty is self-executing, that fact does not necessarily mean that it provides a cause of action. Rather, it means only that the treaty is "regarded in courts of justice as equivalent to an act of the legislature." *Foster*, 27 U.S. at 314. Like an Act of Congress, a treaty may establish legal standards or rules of decision in litigation without itself creating a private right of action. *See, e.g., Argentine Republic* v. *Amerada Hess Shipping Corp.*, 488 U.S. 428, 442 (1989) (explaining that the treaties at issue "only set forth substantive rules of conduct and state that compensation shall be paid for certain wrongs," but did not "create private rights of action for foreign corporations to recover compensation from foreign states in United States courts").

Furthermore, the labeling of an international law norm, derived from ungratified agreements, etc., as "*jus cogens*" violations, *see Siderman de Blake*, 965 F.2d at 714, does not grant any greater legitimacy to judicial enforcement of such norms. Just last month, the D.C. Circuit reiterated that "a sovereign cannot realistically be said to manifest its intent to subject itself to suit inside the United States when it violates a

jus cogens norm outside the United States." *Joo* v. *Japan*, ___ F.3d ___, 2003 WL 21473010 (D.C. Cir. June 27, 2003), citing *Princz* v. *Federal Republic of Germany*, 26 F.3d 1166, 1174 (D.C. Cir. 1994). The D.C. Circuit specifically declined to revisit the holding of *Princz* that "a court cannot create a new exception to the general rule of immunity under the guise of an 'implied waiver. . . .'" The Court further observed, in concluding that it need not reach the question whether the ATS creates a cause of action for alleged violations of international law, that "whatever else the [ATS] might do, it does not provide the courts with jurisdiction over a foreign sovereign." 2003 WL 21473010.n

As the Seventh Circuit recently observed, "the content of the *jus cogens* doctrine * * * emanates from academic commentary and multilateral treaties, even when unsigned by the United States." *Sampson* v. *Federal Republic of Germany*, 250 F.3d 1145, 1155 (7th Cir. 2001). Such sources do not authorize a court to infer a federal cause of action when the political Branches have elected not to use their powers to create one. *See* Christenson, *supra*, 6 J. Transnat'l L & Policy at 485 ("courts in the United States have uniformly rejected application of an asserted *jus cogens* norm as the sole basis for a cause of action."). *Cf. Blankenship* v. *McDonald*, 176 F.3d 1192, 1195 (9th Cir. 1999) (a *Bivens* cause of action should not be recognized where "congressional action has not been inadvertent in providing certain remedies and denying others to judicial employees"); *Spagnola* v. *Mathis*, 859 F.2d 223, 228 (D.C. Cir. 1988) (*en banc*) (same).

Moreover, the approach of looking to unratified agreements to discern the "law of nations" under the ATS cannot be squared with the text of the ATS, which refers to both "treaties of the United States" and the "law of nations." The obvious import of the reference to treaties is that an international agreement must be a *ratified* treaty of the United States, receiving the advice and consent of the Senate, *before*

it could be subject to enforcement in a private suit resting on the jurisdiction of the ATS (assuming further that the treaty confers a private right of action). This Court should, therefore, reject the invitation to erroneously construe the ATS to imply a cause of action to enforce such norms even where the Executive and Congress have declined to embody those norms in a binding or domestically enforceable law or treaty.

For example, in one of the cases cited by plaintiffs, *Alvarez-Machain*, the Ninth Circuit allowed a claim for arbitrary arrest, even though the suspect's seizure was authorized by the U.S. Government. In so holding, the Court erroneously relied upon, *inter alia*, general provisions of the Universal Declaration of Human Rights[7] (a non-binding resolution of the General Assembly of the United Nations), the American Convention on Human Rights[8] (which the Senate *refused* to ratify), and the ICCPR (a non-self-executing treaty). *Alvarez-Machain*, 331 F.3d at 620-622. These documents plainly do not create domestically enforceable *rights*. A court cannot properly find enforceable rights in the American Convention on Human Rights, where the Senate has refused to ratify that convention. And even as to the ICCPR, which is a treaty, when ratified by the United States, the Senate and the Executive Branch (as it has with other modern human rights treaties[9]) expressly agreed that it would *not* be self-executing and may *not* be relied upon by

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[7] G.A. Res. 218A, U.N. GAOR, U.N. Doc. A/810 (1948). Similarly, here, the panel relied upon the Universal Declaration of Human Rights.

[8] 9 I.L.M. 673 (July 4, 1977).

[9] In addition to the ICCPR, the Senate either expressly conditioned its consent or clearly understood that the Genocide Convention, the Torture Convention, and the Convention on the Elimination of All Forms of Racial Discrimination would not be self-executing. *See* 140 Cong. Rec. S14326 (daily ed. June 24, 1994); 136 Cong. Rec. S17491, S17486-01 (daily ed., Oct. 27, 1990); 140 Cong. Rec. S7634-02 (daily ed., June 24, 1994); 132 Cong. Rec. S1355-01, S1378 (daily ed. Feb. 19, 1986).

individuals in domestic court proceedings. *See* S. Exec. Rep. No. 23, 102d Cong., 2d Sess. 9, 19, 23 (1992); 138 Cong. Rec. 8068, 8070-71 (Apr. 2, 1992). It is flatly inconsistent with that decision of the political Branches for a court to nevertheless infer a cause of action to enforce the terms of the agreement.

In certain areas, a court, in connection with a matter already validly pending before it, properly looks to norms of international law to furnish a rule of decision, *e.g.*, *The Paquete Habana*, 175 U.S. 677, 700 (1900). That required practice is very different from a court inferring a cause of action as an initial matter based on international law. As the D.C. Circuit has recognized, international law does not generally provide causes of action enforceable in federal court. *See Tel-Oren*, 726 F.2d at 779 ("the law of nations consciously leaves the provision of rights of action up to the states") (Edwards, J., concurring); *id* at 810 (Bork, J., concurring). But even where a court may properly look to international law norms, it does so only *in the absence* of a "controlling executive or legislative act * * *." *The Paquete Habana*, 175 U.S. at 700. A ratified treaty accompanied by an express declaration that it is not self-executing is plainly such a controlling act. Similarly, the existence of a treaty or convention that has been ratified by some nations and even signed by the United States (but not yet ratified) falls in the same category, because the political Branches have taken the matter fully in hand, but not yet taken the necessary steps to make the treaty binding on the United States; the treaty therefore cannot properly be relied upon in our courts as a source of the law of nations. And United Nations General Assembly resolutions are (with narrow exceptions) not binding on the member nations, and require further action by the member states before they can create any enforceable rights. *See* G. Schwarzenberger & E.D. Brown, A MANUAL OF INTERNATIONAL LAW 237 (1976). The actions or inactions of the political Branches with respect to those instruments must

be deemed dispositive with respect to what effect they have on the law of nations to be applied within the United States. Thus, it is plainly wrong for a court to create a cause of action to enforce such documents in a suit for damages when the political Branches have elected not to do so.

3. Even beyond the general prohibition against judicial creation of a cause of action, there are additional compelling reasons against inferring a cause of action (or creating common law causes of action to enforce international law norms) when the political Branches have not done so. In other contexts, courts refuse to infer causes of action where they implicate matters that by their nature should be left to the political Branches. *See FDIC* v. *Meyer*, 510 U.S. 471, 486 (1994). Matters that implicate international affairs are the quintessential example of a context where a court may not infer a cause of action. Permitting such implied causes of action under the ATS infringes upon the right of the political Branches to exercise their judgment in setting appropriate limits upon the enforceability or scope of treaties and other documents.

The Supreme Court has long recognized that the Constitution commits "the entire control of international relations" to the political Branches. *Fong Yue Ting* v. *United States*, 149 U.S. 698, 705 (1893). *See Oetjen* v. *Central Leather Co.*, 246 U.S. 297, 302 (1918) ("[t]he conduct of the foreign relations of our Government is committed by the Constitution to the Executive and Legislative –'the political' – Departments."). It is the "plenary and exclusive power of the President as the sole organ of the federal government in the field of international relations" to decide the "important complicated, delicate and manifold problems" of foreign relations. *United States* v. *Curtiss-Wright Export Corp.*, 299 U.S. 304, 319, 320 (1936). *See also American Ins. Ass'n* v. *Garamendi*, ___ S.Ct. ___, 2003 WL 21433477, 71 USLW 4524, Slip op. at 15 (June 23, 2003) ("Nor is there any

question generally that there is executive authority to decide what [foreign] policy should be").

Because the Constitution has so committed the power over foreign affairs, the Supreme Court has strongly cautioned the courts against intruding upon the President's exercise of that authority. *See ibid.* Indeed, the Supreme Court has recognized that foreign policy is "of a kind for which the Judiciary has neither aptitude, facilities nor responsibility." *Chicago & So. Air Lines, Inc.* v. *Waterman Steamship Corp.*, 333 U.S. 103, 111 (1948).

Despite this instruction from the Supreme Court, the types of claims that are being asserted today under the ATS are fraught with foreign policy implications. They often involve our courts in deciding suits between foreigners regarding events that occurred within the borders of other nations, and in the exercise of foreign governmental authority. The ATS has been wrongly interpreted to permit suits requiring the courts to pass factual, moral, and legal judgment on these foreign acts. And, under plaintiffs' approach, ATS actions are not limited to suits against rogues and outlaws. Such claims can easily be asserted against this Nation's friends, including our allies in our fight against terrorism. A plaintiff merely needs to accuse a defendant of, for example, arbitrary detention to support such a claim. That approach has already permitted an alien to sue foreign nationals who assisted the United States in its conduct of international law enforcement efforts. *See Alvarez-Machain, supra.* Such claims have also been brought against the United States itself in connection with its efforts to combat terrorism. *See Al Odah* v. *United States*, 321 F.3d 1134, 1144-1145 (D.C. Cir. 2003) (ATS claims asserted of behalf of aliens detained at the U.S. Naval Base at Guantanamo Bay).

Plaintiffs' approach to the ATS thus places the courts in the wholly inappropriate role of arbiters of foreign conduct, including international law enforcement. Where Congress

wishes to permit such suits (*e.g.*, through the Torture Victim Protection Act, 28 U.S.C. § 1350 note), it has done so with carefully prescribed rules and procedures. The ATS contains no such limits and cannot reasonably be read as granting the courts such unbridled authority.

4. Moreover, while Congress can and has created specific offenses, such as piracy, in reference to the "Law of Nations," *see Ex Parte Quirin*, 317 U.S. 1, 30 (1942), it is error to read the ATS' reference to the "law of nations" as granting the judiciary the wholesale power, without direction from the legislature, to define and enforce customary international law through civil damage actions. There is no basis for holding that, by referencing the "law of nations" in the ATS, Congress must have intended to permit the Judicial Branch to engage in a free-wheeling exercise to develop its own views of "customary international law," based on sources that are neither law nor customary, such as unratified treaties and other non-binding documents.

In some instances a court can, as we have noted, look to international law where "questions of right depending upon it are duly presented for their determination." *The Paquete Habana*, 175 U.S. at 700. That principle does not, however, lead to the conclusion that international law provides a private cause of action to be pursued under the ATS. Even where international law norms are considered part of federal common law (*e.g.*, *Banco Nacional de Cuba* v. *Sabbatino*, 376 U.S. 398, 425 (1964)), they do not supply a private right of action. *See Tel Oren*, 726 F.2d at 811 (Bork, J. concurring) ("[t]o say that international law is part of federal common law * * * is not to say that, like the common law of contract and tort, for example, by itself it affords individuals the right to ask for judicial relief").

Those supporting an expansive view of the ATS might nevertheless argue that a federal court can enforce international law under the ATS just as it enforces admiralty law

under its common law powers. It has been long understood, however, that "the body of admiralty law referred to in Article III did not depend on any express or implied legislative action. Its existence, rather, preceded the adoption of the Constitution." *R.M.S. Titanic, Inc.* v. *Haver*, 171 F.3d 943, 960 (4th Cir. 2000). *See also The American Ins. Co.* v. *356 Bales of Cotton*, 26 U.S. (1 Pet.) 511, 544-545 (1828). The Framers drafted Article III with this full body of maritime law "clearly in view." *R.M.S. Titanic*, 171 F.3d at 960. Thus, the reference in Article III to "all Cases of admiralty and maritime Jurisdiction" has been read as authorizing "the federal courts to draw upon and to continue the development of the substantive, common law of admiralty when exercising admiralty jurisdiction." *Id.* at 961. *See also United States* v. *Flores*, 289 U.S. 137, 148 (1933) (Section 2 of Article III "has been consistently interpreted as adopting for the United States the system of admiralty and maritime law, as it had been developed in the admiralty courts of England and the Colonies").

Admiralty law is thus manifestly unique and does not support reading the ATS as granting the courts common law authority to create implied causes of action enforcing vague concepts of international law through an ATS claim. Notably, there is no similar express grant in Article III for the general enforcement of the Law of Nations, as there is for admiralty law. Rather, the power to define and legislate causes of actions regarding Law of Nations offenses is assigned to Congress under Article I. *See* Art. I, Sec. 8, cl. 10. Nor, unlike the admiralty law situation, was there a pre-constitutional history of more than 1,000 years of specialized courts enforcing international law norms relating to human rights.

C. The TVPA Also Does Not Support Inferring A Cause Of Action Under The ATS.

In embracing an expansive view of the ATS, some courts have asserted that Congress ratified *Filartiga* and its progeny

when it enacted the Torture Victim Protection Act. *See* Goodman & Jinks, *Filartiga's Firm Footing: International Human Rights and Federal Common Law*, 66 Fordham L. Rev. 463, 514 (1997). In stark contrast to the ATS, the TVPA expressly provides a cause of action for damages to persons who suffered torture at the hands of any individual acting under the law of any foreign nation. *See* 28 U.S.C. § 1350 note.

In reporting on the TVPA, the Senate Committee did observe that the TVPA would provide "an unambiguous basis for a cause of action that has been successfully maintained under an existing law, section 1350 * * * which permits Federal district courts to hear claims by aliens for torts committed in violation of the law of nations." S. Rep. 102-249 at 4 (1991). The report noted that the "*Filartiga* case has met with general approval," but also recognized that at "least one Federal judge, however, has questioned whether section 1350 can be used * * * absent an explicit grant of a cause of action by Congress." *Id.* 4-5 (referring to Judge Bork's opinion in *Tel-Oren*). The report stated that the TVPA was not intended to displace Section 1350, and concluded that the latter "should remain intact." *Id* at 5. *See also* H.R. Rep. No. 102-367 at 4 (1991).

Based on these *1991* legislative statements regarding a statute enacted in *1789*, some have argued that, regardless of the best reading of the ATS or of the original validity of *Filartiga*, the TVPA evidences Congressional approval of reading the ATS to provide a cause of action. A Congressional committee statement in 1991 about the meaning of the ATS, however, is obviously of no value in discerning the intent of Congress in *1789*. In a similar context, the Supreme Court recently refused to look to legislative history from 1986 setting forth "a Senate Committee's (erroneous) understanding of the meaning of the statutory term enacted some 123 years earlier." *Vermont*

Agency of Natural Resources v. *U.S. ex rel. Stevens*, 529 U.S. 765, 783 n.12 (2000). As Judge Randolph recently explained, "the wish expressed in the committee's statement [about the TVPA] is reflected in no language Congress enacted; it does not purport to rest on an interpretation of § 1350; and the statement itself is legislative dictum." *Al Odah*, 321 F.3d at 1146 (Randolph, J., concurring).

II. NO CAUSE OF ACTION MAY BE IMPLIED BY THE ATS FOR CONDUCT OCCURRING IN OTHER NATIONS.

Even if the ATS could be read to imply (or permit the implication) of a cause of action, it cannot be construed to have that effect in the territory of other nations. Unless expression to the contrary is found within a federal statute, that statute is presumed to apply only within the territory of the United States, or, in limited circumstances, on the high seas. *See Foley Bros., Inc.* v. *Filardo*, 336 U.S. 281, 284-285 (1949). This presumption against extraterritoriality "serves to protect against unintended clashes between our laws and those of other nations which could result in international discord." *EEOC* v. *Arabian American Oil Co.*, 499 U.S. 244 (1991). It dates back to the time the ATS was enacted. Its earliest express application by the Supreme Court is found in *United States* v. *Palmer*, 16 U.S. 610 (1818), where the Court held that a federal piracy statute should not be read to apply to foreign nationals on a foreign ship. *Id.* at 630-31.

Nothing in the ATS or in its contemporaneous history suggests an intent on the part of Congress that it would furnish a foundation for suits based on conduct occurring within other nations. Notably, the only reported cases where courts mentioned the ATS after its recent enactment both involved *domestic* incidents – the capture of a foreign ship in U.S. territorial waters and seizure of slaves on a ship at a U.S. port. *See Moxon* v. *The Fanny*, 17 F. Cas. 942 (D. Pa. 1793); *Bolchos* v. *Darrel*, 3 F. Cas. 810 (D.S.C. 1795). Moreover,

Attorney General Bradford, while noting the availability of ATS jurisdiction for offenses on the high seas in 1795, also explained that insofar "as the transactions complained of originated or took place in a foreign country, they are not within the cognizance of our courts." *See* 1 Op. Att'y Gen. 57, 58 (1795).[10]

As discussed above, many commentators believe that Congress passed the ATS in part to respond to two high profile incidents concerning assaults upon foreign ambassadors *on domestic soil*. *See* pp.5-6, *supra*. Congress enacted the ATS because it wanted to ensure a federal forum so that traditional international law offenses (assaults against ambassadors and interference with the right of safe conduct) committed in this country were subject to proper redress. The point of the ATS was to *avoid* conflict with other countries.

That logic does not support expanding the ATS to encompass claims arising in other nations. Other nations did not in 1789 (and certainly do not today) expect our courts to provide civil remedies for disputes between their own citizens (or involving third-country nationals) that occur on their own soil. *See* THE WRITINGS OF GEORGE WASHINGTON FROM THE ORIGINAL MANUSCRIPT SOURCES, 1745-1799, Fitzpatrick, ed., Letter of George Washington to James Monroe, August 25, 1796 ("no Nation had a right to intermeddle in the internal concerns of another") (available at http://memory.loc.gov/ammem/gwhtml/gwhome.html); *United States* v. *La Juene Eugenie*, 26 F. Cas. 832, 847 (D. Mass. 1822) (Story, J.) ("No one [nation] has a right to sit in judgment generally upon the actions of another; at least to the extent of compelling its adherence to all the principles of justice and humanity in its

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[10] *See also* 1 Op. Att'y Gen. 29, 29 (1792) ("[t]he bringing away of slaves from Martinique, the property of residents there, may be piracy, and, *depending upon the precise place of its commission*, may only be an offence against the municipal laws") (emphasis added).

domestic concerns"). To the contrary, litigating such disputes in this country can itself lead to objections from the foreign nations where the alleged injury occurred. "[T]hose who drafted the Constitution and the Judiciary Act of 1789 wanted to open federal courts to aliens for the purpose of avoiding, not provoking, conflicts with other nations * * *. A broad reading of section 1350 runs directly contrary to that desire." *Tel-Oren*, 726 F.2d at 812 (Bork, J.).

CONCLUSION

For the foregoing reasons, this Court should grant the motion to dismiss the ATS claims.

Respectfully submitted,

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DATED: July 14, 2003

APPENDIX O

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

CA 01-1357

JOHN DOE,

Plaintiff,

v.

EXXON MOBIL CORPORATION,

Defendant.

Washington, D.C.
May 4, 2005
2:31 p.m.

Transcript of Status Conference
Before the Honorable Louis F. Oberdorfer
United States District Judge

APPEARANCES:

For the Plaintiff:	AGNIESZKA FRYSZMAN, ESQ. TERRY COLLINGSWORTH, ESQ. DEREK BAXTER, ESQ.
For the Defendant:	MARTIN WEINSTEIN, ESQ. ROBERT MEYER, ESQ. GEORGE MAXWELL, ESQ. PAUL W. WRIGHT, ESQ.
For the Government:	STRATTON STRAND, ESQ.
Court Reporter:	JON HUNDLEY Miller Reporting Company 735 8th Street, SE Washington, D.C. 20003 (202) 546-6666

[2] PROCEEDINGS

THE DEPUTY C[illegible]K: Civil Action 01-1357, John Doe v. Exxon Mobil Corpo[illegible]ion.

THE COURT: Good afternoon, gentlemen. I would appreciate it if counsel would identify himself and herself. I'll start over here and go around this way.

MR. COLLINGSWORTH: I'm Terry Collingsworth, Your Honor. I represent the plaintiffs.

THE COURT: Very well.

MR. BAXTER: Derek Baxter for the plaintiffs.

THE COURT: And you are plaintiffs' counsel also?

MR. BAXTER: Yes.

MS. FRYSZMAN: Agnieska Fryszman for the plaintiffs.

THE COURT: Ma'am?

MS. FRYSZMAN: Agneiska Fryszman for the plaintiffs.

THE COURT: All right.

MS. WALKER: Terry Walker.

THE COURT: You'll have to speak up if you're going to practice law.

[3] MS. WALKER: Terry Walker.

THE COURT: Ma'am?

MS. WALKER: Terry Walker.

THE COURT: All right. Thank you.

MR. WEINSTEIN: Your Honor, I am Martin Weinstein on behalf of Exxon Mobil Corporation, here with my colleagues Robert Meyer and George Maxwell, also of Willkie, Farr & Gallagher, and Mr. Paul Wright of Exxon Mobil Corporation, Your Honor. Good afternoon.

THE COURT: Nice to have you all.

Yes, sir.

MR. STRAND: Good afternoon, Your Honor. Stratton Strand on behalf of the government.

THE COURT: Oh, why don't you have a seat at the counsel table.

MR. STRAND: I wasn't sure which side to sit on.

THE COURT: Well, why don't you today sit on the defense side, and another day sit on the other side, so you'll be neutral.

And as a matter of fact, I would like to hear from you first, if I might. You are familiar with the letter that was directed to me a couple of years ago by the legal adviser to the Secretary?

[4] MR. STRAND: Yes, sir, I am.

THE COURT: It says in here that the affirmant believes that adjudication of this lawsuit at this time would in fact risk a potentially serious adverse impact on significant interests of the United States. Now that was at that time, which was July 2002, and at this time does the same thing apply?

MR. STRAND: Yes, Your Honor. I have touched base with the State Department yesterday, and that letter remains the case – remains their view at the present time.

THE COURT: Well, we'll see whether we go into that further. Thank you.

MR. STRAND: Thank you, Your Honor.

THE COURT: Let me hear from Mr. Weinstein.

I am confronted with a dilemma here, and I hope that time would cure or ameliorate it, but it hasn't, and I want to tell you what I'm thinking about, and you may want to take some

time to respond here, and I will hear from you anything that's on the top of your head, tip of your tongue, and if you later want to file a paper on that subject, fine.

[5] What I am thinking, in a very gross way, is that the obstacle to the prosecution of plaintiff's claim is the political implications identified by the State Department, and the sovereign immunity defense that's available to the official plaintiffs and not to Exxon.

The plaintiffs identified to me their time concern about not just the loss of documents, but the loss of witnesses, and they could very well, for example – I haven't heard them yet – they could very well indicate that they need to perpetuate testimony. Apparently all the plaintiffs survived this storm out there, but they are still mortal.

Are you prepared to address the question of whether I could efficiently continue the litigation, let the plaintiffs maintain the litigation as against Exxon and its affiliates, corporate affiliate, and at the same time continue holding in abeyance the question of whether there should be – I should dismiss *sua sponte* I guess the claim or claims against the government of Indonesia and any official or corporate affiliate that has a credible claim of sovereign immunity?

MR. WEINSTEIN: Your Honor, this case [6] involves alleged conduct in which the government of Indonesia and the military of Indonesia, in the midst of fighting a civil war on its own soil, has taken certain actions and whether or not they are proper in the midst of that civil war.

The conduct of Exxon Mobil as a contractor to the government of Indonesia and the responsibility that is alleged by Exxon Mobil to have had is inextricably intertwined with the conduct of the Indonesian military which is accused to have directly carried out this conduct.

When you look at the State Department letter, the State Department clearly says that to pursue this case would put in jeopardy U.S.-Indonesian relations. Obviously we would want to give more thought to the Court's position, but clearly –

THE COURT: Let me – what I would like to design is a way to pursue the matter without trampling on the sovereign and other prerogatives of Indonesia.

MR. WEINSTEIN: Your Honor, I understand the Court's desire, but because the conduct in question here is alleged to have been carried out directly by the Indonesian military, it is the [7] defendant's view that in order to have any kind of proper evidentiary or discovery review, inextricably the Indonesian government and the idea of bringing Indonesian government officials into this matter immediately is exactly what we raised in our briefs because the conduct is directly alleged to have involved the Indonesian government and not Exxon Mobil. How we would prepare and defend this case automatically involves at the first step the Indonesian government and Indonesian military personnel.

We have, per the Court's order, preserved all the discovery. it is protected, it is preserved. We understand that the plaintiffs have taken a great number of witness statements. We have not. But the fundamental question in alien tort statute law, the fundamental question before the Court continues to remain today as it did several years ago, which is the pursuit of this case automatically calls into question the question of the Indonesian government, on Indonesian soil, in the midst of a civil war involving Indonesians.

So how we were to pursue any kind of review of the facts without involving Indonesian sovereign actions at the earliest first immediate [8] step, we do not see a way to properly pursue the case without that step. And so we believe the State Department's letter, which clearly says that Indonesian-U.S.

relations would be hurt is as much an issue today as it was when the lawsuit was filed because the plaintiff's allegations are that the Indonesian government is the group, the Indonesian military carried out this conduct and somehow Exxon Mobil is vicariously liable for it.

So unless we probe the conduct itself, we believe that the same issues, political question, active state that existed, and the question of convenience and all of these issues that existed several years ago are just as active and just as much in full force today as they were then.

THE COURT: Let me hear what the plaintiff has to say to answer that.

MR. COLLINGSWORTH: Thank you, Your Honor. Again, I am Terry Collingsworth.

Your Honor, I think your suggestion is excellent that we certainly could come up with a process to minimize any expected impact on the government of Indonesia here. And I just, you know, want to remind the Court, I know it has been a long time since we have all reviewed the [9] complaint, that our allegations are precisely and concisely against the government – or, sorry, against Exxon Mobil only. And we allege in the complaint that the military operations in Aceh are absolutely independent from the claims we have against Exxon Mobil here.

We allege that Exxon Mobil has retained a private security force, they have hired and pay certain troops to perform services for them that are terrorizing our clients and others. There are also private security contractors that are involved in this.

There are any number of things we could do, Your Honor, to keep this focused on exactly the claims that we have alleged here. We could agree to a protective order that makes sure that if we do in any event uncover information that might

be critical of the government or embarrassing to the government that is incidental to the claims that we don't publish it. We don't put it on our Web site. That happens all the time, Your Honor.

I have a bunch of these cases. A long time ago we did submit to you a case called *Boloto v. Chevron Texaco*, a case very similar involving Nigeria, another Islamic country, and this case was [10] filed at about the same time, and the judge there ruled, in denying the motions to dismiss and in addressing these very same issues, that it's premature before discovery to decide questions of political question and the impact on the government. We don't know, as we stand here, how involved Exxon Mobil is directly in having their private security forces go out and do these things. That's the key question, Your Honor.

And I would also point out that there is another case that we have submitted, the *General Johnny Lumitang* case, which involved a case directly against an Indonesian military official, and the argument there was the government of Indonesia never endorsed and never sanctioned what this particular individual did. I guess their position was he was a rogue officer, and if that comes up in this case, Your Honor, we similarly would have some rogue officers working for Exxon Mobil that have nothing to do with the official policy of the government of Indonesia.

But until we get discovery, we don't know that.

And I will just conclude by saying, Your Honor, that we have made our motion because my [11] colleague Derek Baxter went out to Indonesia to try to assess, among other things, what was happening on the ground, and we have since had a couple of folks -

THE COURT: Since that storm.

MR. COLLINGSWORTH: He went before the storm, but we sent somebody after the storm who was Acehnese and was able to move around. And we have documented that nine of the 11 plaintiffs were – survived the tsunami. Our papers weren't exactly accurate because the translation came late from a verbal report, but two of our plaintiffs have died, but unfortunately it was not due to natural causes. They were killed by the Indonesian military, and we will shortly amend the complaint to add those allegations. They were killed by the military, we believe, that were operating on behalf of Exxon Mobil, as the other plaintiffs were injured.

But, Your Honor, the main concern that has brought us here to ask you for this status conference is that our people have documented that Indonesians living in Aceh are fleeing the area. It was completely devastated. We have third-party witnesses, we have employees who were working for Exxon Mobil, we have lots of folks who we need to [12] take their depositions and preserve their testimony. And if we don't do that now, if down the road our arguments are vindicated that we have a legal right to bring this very precise case against Exxon Mobil, we won't have any witnesses, Your Honor.

So we urge you to do that.

THE COURT: All right. I understand that the people that you seek to depose are witnesses for the plaintiff?

MR. COLLINGSWORTH: Well, we would also –

THE COURT: Potentially witnesses for the plaintiff.

MR. COLLINGSWORTH: That's correct, Your Honor.

We would also, while we are out there, like to take some depositions of Exxon Mobil employees who were there, who were able to see these things, who are not management employees, but the people working in the field.

And, Your Honor, in our papers asking for discovery, the defendant answered and raised an issue that I just want to

refute because I think it's essential. They indicated that, well, *we* can't go to Aceh, so this is all a tempest in a[13] teapot. Why would we have discovery if we can't go to Aceh.

We don't need to go to Aceh, Your Honor. We can have these people come out to the nearest large city, probably Medan. My colleague Derek went to Medan and some people from Aceh came out and talked to him and gave him some new details about the ongoing atrocities being committed by the Exxon Mobil troops to this date.

So it's an ongoing violation, and we are terrified that we are not going to be able to prove our case once it's clear that we can go forward.

Thank you, Your Honor.

THE COURT: You are familiar with the process of perpetuating testimony?

MR. COLLINGSWORTH: Yes, Your Honor.

THE COURT: Is that what you have been doing?

MR. COLLINGSWORTH: Well, Your Honor, we have taken statements from some witnesses, but unless we can take a deposition that's noticed with the defendants there, they are going to object that it's not admissible. So that's what we would like to do is to take perpetuation depositions.

THE COURT: And when you say bring people [14] out, you don't mean bring them out of the country?

MR. COLLINGSWORTH: No, Your Honor. Medan is on the same island of Sumatra and it's only the tip of it, Aceh, that was devastated. Medan is one possibility. There is an airport there. And it's where my colleague was able to interview people from Aceh and they can travel from Aceh to Medan by air, by road, and in some cases even by foot. It's not very far.

THE COURT: All right. Let me – thank you, sir.

MR. COLLINGSWORTH: Thank you very much, Your Honor.

THE COURT: Let me hear whether the representative from the government has anything to say.

MR. STRAND: Your Honor, I don't believe that the proposed limited discovery procedure would allay the concerns raised in Mr. Taft's letter. Mr. Taft's letter indicates that the Indonesian government would perceive any adjudication of this case to be an intrusion on its sovereignty because the wrongs that are alleged to have occurred are specifically alleged to have been committed by Indonesian military personnel operating under the [15] auspices of Exxon.

THE COURT: Now what would they say if the plaintiffs were able to design a discovery process that focused on Exxon?

MR. STRAND: I don't want to anticipate what the State Department's response would be to a particular procedure that has not been outlined yet, but in general, the concern is with discovery taking place at all. The Indonesian ambassador has written a letter to the State Department.

THE COURT: I think I have seen that.

MR. STRAND: Indicating that any adjudication of this, including the discovery process, which would air information on what the security forces did would not only be an affront to them, but also would possibly create instability in Indonesia because Indonesia is looking for cohesion right now in a time when there are strong secessionist movements, and if information came out through this discovery process that military forces had been involved in these type of abuses, that would raise the very concern that the Indonesian government has expressed to the State Department.

THE COURT: Did you hear plaintiff's counsel represent that since the tsunami, two of [16] the plaintiffs have been killed by the process that plaintiffs are complaining about?

MR. STRAND: I heard them say that the killings were done by the Indonesian military, and that they plan to amend the complaint to add a claim regarding that. That's exactly the concern that underlies Mr. Taft's letter.

THE COURT: All right. Thank you. Yes, sir.

MR. COLLINGSWORTH: Your Honor, just for a moment, if you don't mind, since there are really two arguments going on against us here. Again, Your Honor, essentially the position just articulated by the State Department apparently would make it impossible for any case to be brought.

These are two Federal statutes we are talking about, the ATS, which has been vindicated in *Sosa*, and the TVPA, and I can understand if there was a legitimate concern that we were going to take on the government head on and embarrass them. That's what that process of the State Department is designed for.

But the position they are taking wouldn't allow – it obliterates the statute. You couldn't [17] bring any case. Your solution is excellent because it seeks to eliminate the problem they claim to have identified, but still allows us to go after the defendant that we have sued.

And, Your Honor, I can only further represent that we have a number of other cases like this. We have very complicated protective orders, and that we have managed to go forward without the diplomatic walls crumbling down.

THE COURT: All right. Let me ask you this. What would happen to your case – let me back up.

Your complaint doesn't exactly separate the acts of the Indonesian government and the acts of Exxon. Would it be possible to design an order that dismissed the complaint

against the Indonesian government and the case then carried forward against Exxon?

MR. COLLINGSWORTH: Your Honor, I am happy to tell you that we didn't sue the government of Indonesia. I think you might think that because of the representations being made here. But our complaint not only is only against Exxon Mobil and its Indonesian affiliate, Exxon Mobil Indonesia, but all of our allegations go to great lengths to [18] make a distinction between the regular military activities going on in Indonesia and the activities of the forces.

I personally, Your Honor, went to Aceh when we initiated this case. I interviewed hundreds of people, and all of them had some complaint about the Indonesian military.

The only people we selected as plaintiffs initially, the 11, they were able to identify the specific Exxon Mobil force that was the one responsible for their injuries. Several of them were dragged onto Exxon Mobil property and detained there and tortured.

So our complaint is already geared that way, and we could design an order that limits discovery to the activities of Exxon Mobil and how they directed the security forces that answer to them. And that's all we want, Your Honor. And that's why we are here. This is not a political case, as far as I am concerned. I want my clients to be compensated for what they have suffered at the hands of Exxon Mobil.

THE COURT: All right. Thank you.

MR. COLLINGSWORTH: Thank you.

MR. WEINSTEIN: Your Honor, when we were [19] here to discuss the motion to dismiss, some of the main issues we talked about involved state action, involved vicarious liability, involved the liability of a third party, private corporation for the conduct of security forces belonging to a particular government.

THE COURT: Is there a contract between Exxon and the government?

MR. WEINSTEIN: Yes, Exxon Mobil is a contractor to the government in connection with this field.

THE COURT: And does the contract include provision for security?

MR. WEINSTEIN: Yes, it does, security is provided by the Indonesian government because the property is Indonesian soil and owned by the Indonesian government.

THE COURT: And for a consideration?

MR. WEINSTEIN: Well, Your Honor, part of the entire project is that Exxon Mobil is developing the resources and the Indonesian government is going to supply the security. So out of some of the proceeds of the project, the security forces, for example, what they need for food and clothing, comes out of the project. But [20] there is not a separate contract, sir.

Your Honor, the idea that Mr. Collingsworth is putting forward underlies – undermines the whole concept of what this complaint is about. In order to press this complaint, the idea that Exxon Mobil is functioning as a state actor is imperative.

One cannot divorce the alleged conduct of the Indonesian military from the alleged conduct of Exxon Mobil. The idea that a discovery plan will be fashioned to talk to those people who are potentially vicariously liable for the conduct of the government without talking about the government is unrealistic and irrelevant. Because the idea here in this case, according to the plaintiffs, is that the government security forces conducted certain conduct, as Mr. Taft says, in the complaint, all of the human rights abuses and injuries alleged in the complaint refer to conduct alleged to have been committed by the military and police forces of the government of Indonesia.

THE COURT: By individuals.

MR. WEINSTEIN: By individuals. How one can probe whether or not that conduct was proper, improper, who was responsible for it, who knew [21] about it, who ordered it, who supported it –

THE COURT: Well, let me put it this way. Under a concept of this configuration of it, the issue would be not who knew about it, who supported it, whether Exxon did or didn't know about it, and Exxon did or did not support it.

MR. WEINSTEIN: That's correct, Your Honor. That's one portion of the case.

THE COURT: And that should be available information on that issue in a properly discovered – properly conducted discovery program. It should be available out of the mouths of Exxon.

MR. WEINSTEIN: Well, Your Honor, what the State Department tells us – and recognizing where we are and what we are talking about and where – the idea that Exxon Mobil employees or executives would be probed about the conduct of the Indonesian government in a place where there is a civil war going on, and that the Indonesian government would not be impacted, as set forth in the State Department letter, the idea that through some protective order or through some secret proceeding, all of this occurs without impacting the very fears of the Secretary of State underlies exactly what the State Department letter was all about.

[22] Now Mr. Collingsworth says this undercuts the whole body of law and means that there are no cases anywhere that could be brought. We would disagree. Indonesia is the country with the largest Muslim population in the world. It has an insurgency movement that is an Islamic fundamentalist insurgency movement that is operating in Aceh. It is in the midst of a civil war. It is a very strong U.S. ally on the war on

terror, so it is not your average country. It is a very significant ally to the United States.

THE COURT: I don't know what my average country is. Go ahead.

MR. WEINSTEIN: Well, Your Honor, we don't believe that by following Mr. Taft's letter in this instance that it undercuts Mr. Collingsworth's ability to bring all of these cases that he wants all around the world.

In this instance, the conduct that he intends to probe is allegedly state action that is inextricably intertwined with the conduct of the Indonesian military.

Now the claim is that this Indonesian military is somehow Exxon's army, but even in this complaint, this is a sovereign military force that [23] Mr. Collingsworth and his plaintiffs claim has been somehow coopted by a private party.

But that's the whole question of state action, and that's exactly what needs to be probed in this case if the plaintiffs want to go forward. Other questions just would simply be irrelevant.

So we believe in following the State Department's letter that fashioning – as I understand, there are questions of the tsunami and questions of time, but the issue in this case, given that the State Department letter is as vibrant and relevant and active today as it was two years ago, it is impossible to get around the fact that by undertaking discovery of any relevance to this case, it will impact on U.S.-Indonesian relations in a way that Mr. Taft had issue with and the Secretary of State believes would be harmful.

Thank you, sir.

THE COURT: Thank you, sir.

Counsel, would you come back to the podium, please.

Have you prepared a discovery plan?

MR. COLLINGSWORTH: Not as such, Your Honor, but I can prepare one very quickly.

THE COURT: All right. Why don't you [24] prepare it quickly. I'd like one prepared with care, but would you furnish me and the defendant a copy of a proposed discovery plan, and I will invite the – and when would you be able to do that?

MR. COLLINGSWORTH: Five days, Your Honor. Early next week.

THE COURT: All right.

MR. COLLINGSWORTH: The reason for the delay, Your Honor, is that I would consult with my colleagues in Aceh.

THE COURT: That's no delay. That's prompt. You're not going to get it done by that time.

MR. COLLINGSWORTH: I will.

THE COURT: But – all right. Thank you.

Mr. Weinstein, let me ask you, will you be able to respond and comment on that plan in how much time? Of course, you haven't seen it.

MR. WEINSTEIN: Your Honor, my sense is if we could have two weeks, 10 working days –

THE COURT: All right.

MR. WEINSTEIN: If that would be appropriate with the Court, we could comment on that.

[25] THE COURT: That would be fine.

MR. WEINSTEIN: Thank you, sir.

THE COURT: And will the United States wish to comment on it?

MR. STRAND: We would, Your Honor. I'm not sure we could be quite as quick, but if we could have –

THE COURT: Well, there's nothing in my book that would proscribe you through the State Department consulting Indonesia.

MR. STRAND: Correct, Your Honor.

THE COURT: And having said that, do you need more than 10 days?

MR. STRAND: Yes. I would think at least 30 days would be appropriate.

THE COURT: What?

MR. STRAND: I would think 30 days would be appropriate, Your Honor.

THE COURT: All right. On that basis, would you like more time?

MR. COLLINGSWORTH: Sure, Your Honor. I was trying to do it quickly, but if we're going to wait 30 days for them, I would certainly like —

THE COURT: Well, again, I would afford you an opportunity to respond to their comments on [26] your plan.

MR. COLLINGSWORTH: Yes, Your Honor. If I could have 10 days to get you the plan, then, and then 10 days to comment on their comments, that would be appropriate for us.

THE COURT: This will be reflected in a written order that will be served on each of you. And so far as I am concerned, unless anybody has something further, we are adjourned.

[Whereupon, at 3:00 p.m., the status conference was concluded.]

APPENDIX P

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

Civil Action No. 1:01CV1357 (LFO)

JOHN DOE I, et al.,
Plaintiff,

v.

EXXON MOBIL CORPORATION, et al.,
Defendants.

AMICUS CURIAE UNITED STATES' STATEMENT OF INTEREST

In response to the Court's request of May 4, 2005, and pursuant to 28 U.S.C. § 517, *Amicus Curiae* United States hereby submits as a statement of interest in this litigation a letter from U.S. Department of State Legal Adviser John B. Bellinger, III, to the Honorable Louis F. Oberdorfer. The letter is attached hereto as Exhibit A.

Respectfully submitted,

/s/:Kenneth L. Wainstein
Kenneth L Wainstein, D.C. Bar # 451058
United States Attorney

/s/:Madelyn Johnson
Madelyn Johnson, D.C. Bar #292318
Assistant United States Attorney

/s/:Stratton C. Strand
Stratton C. Strand, D.C. Bar #464992
Assistant United States Attorney

Of Counsel:

Jim Hergen, Esq.
Office of the Legal Adviser
U.S. Department of State
2101 C Street, N.W.
Room 5527
Washington, D.C. 20520

THE LEGAL ADVISER
DEPARTMENT OF STATE
WASHINGTON

July 15, 2005

Honorable Louis F. Oberdorfer
United States District Court for
the District of Columbia
333 Constitution Ave., NW
Washington, D.C. 20001

Re: *Doe, et al. v. ExxonMobil, et al.*, No. 01-CV-1357 (DDC)

Dear Judge Oberdorfer:

Thank you for inviting the views of the Department of State and the Government of Indonesia regarding plaintiffs' proposed discovery plan of May 16.

The proposed discovery plan triggers the concerns set forth in the State Department letter of July 2002, which remain valid today. With regard to the practicalities of conducting discovery in Indonesia, and Indonesian objections to the discovery plan, we are transmitting for the Court's information Indonesian diplomatic note No. 145/VI/05/05/DN of June 15 in response to the Court's invitation for the views of the Government of Indonesia.

Finally, we emphasize that the discussion of human rights abuses remains a key component in our relations with the government of Indonesia, and we continue to work vigorously to bring human rights abuses in Aceh to an end through diplomatic and other means.

I hope that this information will be helpful to the Court.

Sincerely,
/s/ John B. Bellinger, III
John B. Bellinger, III

Enclosure:
Diplomatic Note No. 145/VI/05/05/DN

GOVERNMENT EXHIBIT A

EMBASSY OF THE REPUBLIC OF INDONESIA
2020 MASSACHUSETTS AVENUE, N.W.
WASHINGTON, D.C. 20036

No.: 145/VI/05/05/DN

The Embassy of the Republic of Indonesia presents its compliment to the Department of State and has the honor to refer to Civil Action No. 01-1357 (LFO) on *Doe*, et al. v. *ExxonMobil* et al. case. In this connection, the Embassy has further the honor to reiterate the statements contained in the letter from Ambassador Brotodiningrat to Hon. Richard L. Armitage, Deputy Secretary of State, dated July 15, 2002.

In line with the above reaffirmation, in particular that of the Ambassador's statement that *"as a matter of principle, we cannot accept the extra territorial jurisdiction of a United States Court over an allegation against an Indonesian government institution, cq the Indonesian military, for operations taking place in Indonesia"*, the Embassy would like to draw the kind attention of the Department that limited discovery as proposed by the plaintiffs is unacceptable to Indonesia. The Embassy further requests the esteemed Department to help ensure that the judicial sovereignty of the Republic of Indonesia be fully and thoroughly respected.

The Embassy of the Republic of Indonesia avails itself of this opportunity to renew to the Department of State the assurances of its highest consideration.

Washington, DC, June 15, 2005

The Department of State
of The United States of America
Washington, DC

APPENDIX Q

Embassy Of The Republic Of Indonesia
2020 Massachusetts Avenue, N.W.
Washington, D.C. 20036

No.: 120/II/07/05/DN

The Embassy of the Republic of Indonesia presents its compliments to the Department of State and has the honor to refer to the letter of Ambassador Brotodiningrat to the Honorable Richard L. Armitage, Deputy Secretary of State, dated July 15, 2002, and the diplomatic note of the Indonesian Embassy No. 145VI/05/05/DC dated July 15, 2005 (attached). Both documents clearly expressed the position of Indonesian Government toward the ongoing civil litigation referred to as Lawsuit Civ. No. 01-1356 (LFO) in the United States District Court for the District of Columbia.

The Embassy of the Republic of Indonesia follows with concern the continuation of the case whereby the District Court dismissed the federal claims but allowed Plaintiffs to amend their baseless complaint to be heard at the state level.

In this regard, Indonesia should like to reaffirm its position as contained in the previous correspondences.

In addition, the Embassy should like to highlight the progress that has been made towards establishing peace in Aceh. It is a well-known fact that peace has finally arrived in Aceh with the signing of the Memorandum of Understanding between Government of Indonesia and Free Aceh Movement signed in Helsinski on 15 August 2005, which provided, inter-alia, a legal basis for the promulgation of a new law of government in Aceh guaranteeing free and fair local elections, the establishment of a human rights court and the establishment of a commission for truth and reconciliation, to end all acts of violence and the establishment of an Aceh Monitoring Mission by the European Union and ASEAN

Contributing Countries to monitor the implementation of the MoU.

Based on this MoU, Aceh has witnessed a free and fair election monitored by international community, including US-based election monitors.

On 14 August 2006, in the "*International Conference: One Year After the Signing of MoU Helsinki*" in Jakarta, Indonesia, Finnish President, Japanese Prime Minister, British Prime Minister, H.E. Nelson Mandela, Malaysia Prime Minister, Australian Prime Minister, UN Secretary-General, congratulated Indonesia for its achievement in materializing the peace in Aceh.

It is against this backdrop that the continuation of the Lawsuit Civ. No. 01-1357 (LFO) could be deemed as undermining the result of the democratic process, ending more than three decades of conflict in Aceh.

The Embassy highly appreciates the kind consideration of the Department on this matter and for it to be communicated with relevant institutions in the United States.

The Embassy of the Republic of Indonesia avails itself of this opportunity to renew to the Department of State the assurances of its highest consideration.

Washington, D.C., February 1, 2007

The Department of State
of The United States of America
Washington, D.C.

APPENDIX R

UNTITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

MDL No. 1499 (JES)

JAMES B. COMEY
United States Attorney for the
Southern District of New York
By: DAVID S. JONES (DJ-5276)
Assistant United States Attorney
33 Whitehall Street, 8th Floor
New York, New York 10004
Tel: (212) 637-2739

In re South African Apartheid Litigation

STATEMENT OF INTEREST OF THE UNITED STATES

By letter to the Honorable William H. Taft, IV, Legal Adviser of the United States Department of State, the Court "inquire[d] whether the Department of State has an opinion as to whether adjudication of these cases would have an adverse impact on the interests of the United States and, if so, the nature and significance of any such impact." *See* Letter from the Honorable John E. Sprizzo of August 7, 2003, annexed hereto as Exhibit A. Pursuant to 28 U.S.C. § 517[1], the Attorney General, on behalf of the Department of State, respectfully submits this Statement of Interest in response to the Court's inquiry.

[1] "The Solicitor General, or any officer of the Department of Justice, may be sent by the Attorney General to any . . . district in the United States . . . to attend to any [] interest of the United States." 28 U.S.C. § 517.

Attached hereto as Exhibit B is a letter, dated October 27, 2003, from William H. Taft, IV, Legal Adviser, United States Department of State, to Shannen Coffin, Esq., United States Department of Justice, which provides the Department of State's views in response to the Court's inquiry concerning the interests of the United States in this matter.

Dated: New York, New York
October 30, 2003

Respectfully submitted,

JAMES B. COMEY
United States Attorney for the
Southern District of New York
Attorney for the United States of America

By: /s/ David S. Jones
DAVID S. JONES (DJ-5276)
Assistant United States Attorney
33 Whitehall Street, 8th Floor
New York, New York 10004
Tel. (212) 637-2739

EXHIBIT A

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
UNITED STATES COURTHOUSE
NEW YORK, NEW YORK 10007

[Filed AUG. 13, 2003]

CHAMBERS OF
JOHN E. SPRIZZO
DISTRICT JUDGE

August 7, 2003

Honorable William H. Taft, IV
Office of the Legal Adviser
United States Department of State
2201 C Street, N.W., Room 6423
Washington, DC 20520

Re: In re South African Apartheid Litigation, MDL No. 1499 (JES)

Dear Mr. Taft:

Although not entirely identical in their allegations, the complaints in the ten actions comprising the above-captioned multidistrict litigation currently pending before me generally charge dozens of multinational corporations with human rights violations stemming from their alleged business dealings in South Africa during the apartheid era.

On November 6, 2003, I will hear oral argument on defendants' joint motion to dismiss the actions due to lack of subject matter jurisdiction. It is the defendants' position that the cases should be dismissed because, among other reasons, plaintiffs' claims are not justiciable insofar as adjudication would require a court to resolve questions entrusted to the political branches of our government. Defendants also contend that plaintiffs' allegations fail to plead a violation of

international law or a United States treaty as required by the Alien Tort Statute, 28 U.S.C. § 1350. Plaintiffs' response to defendants' motion is scheduled to be submitted on or before September 8, 2003.

I recently received a declaration from Penuell Mpapa Maduna, the Minister of Justice and Constitutional Development of the Republic of South Africa, in which Dr. Maduna conveyed to me the official position of his government that the proceedings currently before me impermissibly interfere with South Africa's efforts to address political matters in which it, as a foreign sovereign, has a predominant interest.

In light of Dr. Maduna's declaration, I thought it prudent to inquire whether the Department of State has an opinion as to whether adjudication of these cases would have an adverse impact on the interests of the United States and, if so, the nature and significance of any such impact. Since, as mentioned above, the cases are scheduled for oral argument on November 6, 2003, your response prior to that date would be appreciated.

I enclose for your convenience copies of the complaints in two of the actions, as well as copies of defendants' joint motion to dismiss and Dr. Maduna's declaration.

Very truly yours,

/s/ John E. Sprizzo
JOHN E. SPRIZZO
United States District Judge

Enclosures

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EXHIBIT B

THE LEGAL ADVISER
DEPARTMENT OF STATE
WASHINGTON

October 27, 2003

Shannen W. Coffin
Deputy Assistant Attorney General
Civil Division
U.S. Department of Justice
950 Pennsylvania Ave., N.W., Room 3137
Washington, D.C. 20530

Re: *In Re South African Apartheid Litigation*, MDL No. 1499 (S.D.N.Y.)

Dear Mr. Coffin:

I am writing in response to Judge John E. Sprizzo's letter of August 7, which is attached hereto, and request that the Department of Justice submit this response to the Court. Judge Sprizzo inquired whether the Department of State believes that adjudication of the above-captioned litigation would have an adverse impact on the interest of the United States and, if so, the nature and significance of that impact. The Department's views are set out below.

At the outset, I reiterate the long-standing opposition of the United States Government to, and its abhorrence of, the institution and practices of apartheid and our commitment to helping the people of South Africa overcome their tragic past.

With respect to litigation in U.S. courts by alleged victims of apartheid, an initial concern relates to the Alien Tort Statute, 28 U.S.C. § 1350, which we understand is a central basis for the current apartheid cases. The statute has been addressed by a number of courts over the past two decades,

including the Second Circuit in *Filartiga v. Pena-Irala*[2] and *Flores v. Southern Peru Copper Corporation.*[3] The United States Government has a substantial interest in the proper interpretation and application of this statute because it implicates profound separation of powers concerns and serious consequences for both the development and expression of the nation's foreign policy. The United States has recently taken the position in various pending cases that the Alien Tort Statute is a jurisdictional provision only and does not itself create any private causes of action. For the Court's convenience, I have attached a copy of the brief recently submitted to the U.S. Supreme Court by the United States in support of a petition for certiorari in *Sosa v. Alvarez-Machain* (No. 03-339).

More specifically with respect to the subject matter of the litigation, it is our view that continued adjudication of the above-referenced matters risks potentially serious adverse consequences for significant interests of the United States. The Government of South Africa has, on several occasions and at the highest levels, made clear its view that these cases do not belong in U.S. courts and that they threaten to disrupt and contradict its own laws, policies and processes aimed at dealing with the aftermath of apartheid as an institution. As Minister of Justice Maduna explained in his letter to the Court of July 11, 2003, the current Government of South Africa has taken extensive steps to promote reconciliation and redress for apartheid-era injustices. We note that the government pursuing these policies is broadly representative of the victims of the apartheid regime and believe that this government is uniquely charged with a popular mandate to deal with the legacy of apartheid.

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[2] 630 F.2d 876 (2d Cir. 1980).

[3] 343 F.3d 140 (2d Cir. 2003).

Support for the South African government's efforts in this area is a cornerstone of U.S. policy towards that country. For that reason, we are sensitive to the views of the South African government that adjudication of the cases will interfere with its policy goals, especially in the areas of reparations and foreign investment, and we can reasonably anticipate that adjudication of these cases will be an irritant in U.S.-South African relations. To the extent that adjudication impedes South Africa's on-going efforts at reconciliation and equitable economic growth, this litigation will also be detrimental to U.S. foreign policy interests in promoting sustained economic growth in South Africa.

Various other foreign governments, including those of the United Kingdom and Canada, have also approached us via diplomatic channels to express their profound concern that their banks, corporations and other entities have been named as defendants. In light of their strong belief that the issues raised in the litigation are most appropriately handled through South Africa's domestic processes, we can anticipate possible, continuing tensions in our relations with these countries over the litigation.

We are also concerned that adjudication of the apartheid cases may deter foreign investment where it is most needed. The United States relies, in significant part, on economic ties and investment to encourage and promote positive change in the domestic policies of developing countries on issues relevant to U.S. interests, such as respect for human rights and reduction of poverty. However, the prospect of costly litigation and potential liability in U.S. courts for operating in a country whose government implements oppressive policies will discourage U.S. (and other foreign) corporations from investing in many areas of the developing world, where investment is most needed and can have the most forceful and positive impact on both economic and political conditions. To the extent that the apartheid litigation in U.S. courts deters

such investment, it will compromise a valuable foreign policy tool and adversely affect U.S. economic interests as well as economic development in poor countries.

We would be pleased to provide any additional information the Court may require.

Sincerely,

/s/ William H. Taft
WILLIAM H. TAFT, IV

Enclosures:
As stated.

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(2)

No. 07-81

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IN THE

Supreme Court of the United States

EXXON MOBIL CORPORATION, *et al.*,
Petitioners,

v.

JOHN DOE I, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the
United States Court of Appeals
for the District of Columbia Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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October 2007

QUESTION PRESENTED

Whether the collateral order doctrine should be expanded to allow a private U.S. corporation sued in a federal district court for its tortious actions to appeal from an order that, in response to Statements of Interest by the Executive Branch notifying the court of potential U.S. foreign policy concerns, grants in part and denies in part the corporation's motion to dismiss the plaintiffs' claims under the political question doctrine.

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RESPONDENTS' BRIEF IN OPPOSITION

The petition for certiorari filed by Exxon Mobil Corporation and its affiliates (collectively "Exxon") seeks to expand the collateral order doctrine to require the court of appeals to consider whether the district court's October 14, 2005 order properly denied in part Exxon's motion to dismiss respondents' claims on political question grounds.

There is no basis for review of the D.C. Circuit's dismissal of Exxon's political-question appeal. Not only is there no circuit split on the question presented, but there is not a single case in which a circuit court has found the denial of a motion to dismiss on political question grounds immediately appealable under the collateral order doctrine. Unsurprisingly, the court of appeals' opinion was unanimous on this issue.[1]

Exxon did not request certification for immediate review under 28 U.S.C. § 1292(b). Instead, it sought (and seeks from this Court) a novel expansion of the collateral order doctrine to obtain fact-bound review of the correctness of the district court's order dismissing some (but not all) of the claims against it—an order that the court issued in deference to a communication from the U.S. State Department. Although Exxon argued on appeal that immediate appellate review was necessary because continued litigation of the case would conflict with U.S. foreign policy interests, the United States did not appear in the court of appeals. Indeed, the State Department expressed no further concerns in the district court regarding the litigation after the district court dismissed respondents' claim under the Alien Tort Statute in its October 14, 2005 order, in accordance with the United States' request.

Therefore, the petition should be denied.

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[1] Judge Kavanaugh dissented only from the court of appeals' ruling that a writ of mandamus was unavailable. Pet. App. 24a, 41a, 45a. Exxon does not seek review of the court's denial of mandamus relief. *See* Pet. i.

STATEMENT OF THE CASE

1. Exxon operates a large natural gas facility in the Aceh province of Indonesia. Respondents are eleven Indonesian villagers from Aceh (or their survivors) who suffered murder, torture, sexual assault, battery, false imprisonment, and other wrongs at the hands of Exxon's security forces. Those security forces were members of the Indonesian military hired by Exxon for the "sole and specific purpose" of providing security for Exxon. First Amended Complaint ¶ 47.[2] As Exxon has said, its security personnel acted only to defend its natural gas operations, "not for maintaining general law and order." *Id.* ¶ 48 & n.19. Exxon paid a regular monthly fee for these security services, *id.* ¶¶ 51-53; provided its security personnel with military equipment and other support, *id.* ¶¶ 54, 78; and had the ability to, and did, supervise, control, and direct its security personnel at all times. *Id.* ¶¶ 49, 54, 57, 134. Relevant decisions were made in the United States by the U.S.-based defendants. *Id.* ¶¶ 25-33.

In June 2001, respondents sued Exxon and PT Arun LNG Company, an entity 55 percent owned by the Indonesian government, in the U.S. District Court for the District of Columbia. Respondents sought relief under the Alien Tort Statute ("ATS"), 28 U.S.C. § 1350, and the Torture Victims Protection Act ("TVPA"), 28 U.S.C. § 1350 note. They also brought common-law tort claims for wrongful death, assault, battery, arbitrary arrest, and detention, among others. Pet. App. 4a-5a. In October 2001, Exxon moved to dismiss the federal claims for failure to state a claim and to dismiss the entire case on the grounds, among others, of forum non conveniens and the act of state and political question doctrines. R. 13.

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[2] Petitioners appended to their petition the original complaint, Pet. App. 91a-130a, but the narrower First Amended Complaint filed by respondents after the district court dismissed their federal claims now governs the lawsuit. *See* D.C. Cir. Deferred Appendix ("DA") 353-95 (R. 129).

While the motion to dismiss was pending, District Judge Oberdorfer solicited the U.S. State Department's opinion regarding whether adjudication of respondents' claims would adversely affect U.S. foreign policy interests. Pet App. 5a, 64a-65a. In response, the State Department submitted a letter dated July 29, 2002, *id.* at 131a-138a, conveying its view "that adjudication of this lawsuit at this time would in fact risk a potentially serious adverse impact on significant interests of the United States," *id.* at 133a, together with a July 15, 2002 letter from the Indonesian Ambassador objecting to adjudication of the case. *Id.* at 139a-140a. The State Department did not express a view in its letter that the case was nonjusticiable, and indeed, its Statement of Interest was qualified and appeared to assume that the litigation would continue:

> Much of this assessment is necessarily predictive and contingent on how the case might unfold in the course of litigation. *E.g.*, the nature, extent, and intrusiveness of discovery; the degree to which the case might directly implicate matters of great sensitivity to the Government of Indonesia and call for judicial pronouncements on the official actions of the GOI with respect to the conduct of its military activities in Aceh; the effect that a decision in favor of plaintiffs might encourage secessionist activities in Aceh and elsewhere in Indonesia; whether the case were to go to a jury and, if so, whether a substantial monetary award were to be imposed on Exxon Mobil; how other large commercial interests might interpret such a judgment when making investment decisions in Indonesia.

Id. at 134a n.1.

The following year, while the motion to dismiss was still pending, the United States filed a Supplemental Statement of Interest. *Id.* at 141a-163a. This second statement, from the

U.S. Department of Justice, reiterated the concerns articulated in the 2002 letter and expressed the view that "[t]hose concerns can be avoided by holding, as the United States contends, that the ATS does not create an independent right of action." *Id.* at 142a. A legal argument followed that respondents' claims under the ATS should be rejected, *id.* at 143a-163a, along with a request that the Court grant Exxon's motion to dismiss the ATS claims. *Id.* at 163a. The United States did not urge the district court to dismiss the remainder of respondents' claims under the political question doctrine.

Finally, on July 15, 2005, the State Department submitted one last letter to the district court expressing continued concern in light of respondents' proposed discovery plan of May 16, 2005 (R. 86) and appended a letter from the Embassy of Indonesia also objecting to the proposed discovery. *Id.* at 183a-84a. The plan would have involved relatively broad discovery extending to documents and depositions in Indonesia. The scope of discovery respondents proposed was rejected by the district court. *See id.* at 84a-89a.

2. On October 14, 2005, the district court granted in part and denied in part Exxon's motion to dismiss. *Id.* at 46a-63a. Consistent with Judge Oberdorfer's declaration early in the case that he would "be very deferential to the State Department on this kind of a matter at this time in our history," DA 148 (Apr. 9, 2002 Hrg.), the court gave serious weight to the concerns expressed by the State Department, Pet. App. 50a-52a, and tailored its order to address those concerns.

First, the district court dismissed respondents' claims under the ATS, as the United States had requested. Apart from finding respondents' federal claims legally insufficient in part, the district court dismissed respondents' ATS claims because aspects of them—such as genocide and crimes against humanity, and allegations that Exxon engaged in joint action with the Indonesian military to engage in torture, arbitrary

detention, and extrajudicial killing—would require the court "to evaluate the policy or practice of the foreign state." *Id.* at 55a; *see also id.* at 58a. Second, the court refused to adjudicate respondents' TVPA claim, in part because it also would "impermissibly require[] adjudication of another country's actions." *Id.* at 60a. Third, Judge Oberdorfer agreed that "[p]roper concern for Indonesia's sovereignty" required dismissal of PT Arun LNG Co. from the case because adjudicating the liability of an entity largely owned by the Indonesian government "would create a significant risk of interfering in Indonesian affairs and thus U.S. foreign policy concerns." *Id.* at 61a. However, the court rejected Exxon's forum non conveniens argument and its motion to dismiss the entire case on political questions grounds. *Id.* at 61a-62a. With PT Arun dismissed as a party, the district court determined that "the resolution of this case would not turn on any 'official action' of the Indonesian government." *Id.* at 61a n.7.

The court allowed respondents' tort claims to proceed, however, "with the proviso that the parties are to tread cautiously. Discovery should be conducted in such a manner so as to avoid intrusion into Indonesian sovereignty." *Id.* at 61a. "Litigation and discovery . . . , if conducted with care, should alleviate the State Department's concerns about interfering with Indonesia's sovereign prerogatives while providing a means for plaintiffs to obtain relief." *Id.* at 63a. "It should be feasible," the court continued, for "plaintiffs to perpetuate testimony and satisfy document discovery requirements outside Indonesia." *Id.* To avoid intrusion into Indonesian sovereignty, the court would exercise "firm control over any discovery conducted by plaintiffs." *Id.* at 61a.[3]

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[3] Given the dismissal of the federal claims, the court ordered respondents to show cause why the complaint should not be dismissed for lack of subject-matter jurisdiction over the remaining claims. Pet. App. 47a. Respondents asserted diversity jurisdiction over these claims and filed a

3. Exxon appealed the district court's October 2005 order, challenging the court's refusal to dismiss respondents' tort claims. Exxon did not ask the district court to certify its order for interlocutory appeal under 28 U.S.C. § 1292(b), but argued in the court of appeals that the interlocutory order was immediately appealable under the collateral order doctrine and asked, in the alternative, for a writ of mandamus. Exxon moved in the district court for a stay of proceedings pending the disposition of its appeal, which the court denied. DA 276-80 (R. 109). The court rejected, among other things, Exxon's assertions that discovery would inevitably violate Indonesian sovereignty and that the State Department wholly opposed discovery and litigation of this case. *Id.* at 277-78. The court also reiterated that, in contrast to genocide and crimes against humanity, "whether Defendants committed various torts . . . in securing their pipeline [would] not require the court to reach any conclusions regarding Indonesia's policies." *Id.* at 277.

Exxon likewise sought a stay from the D.C. Circuit, which the court denied, and then a motion for reconsideration of that denial, which the court also denied.

The State Department expressed no further concerns regarding the litigation, despite queries by the district court. During a December 15, 2005 hearing to discuss how the parties would "proceed with discovery and litigation on the state court claims without interfering with U.S. foreign policy and Indonesia sovereignty," DA 285, Judge Oberdorfer asked the Assistant U.S. Attorney who attended the conference whether the United States had anything it wished to add. The Assistant U.S. Attorney responded that he had nothing to say "[o]ther than that the State Department very much appreciates the

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proposed amended complaint. *See supra* note 2. The district court granted respondents' motion to amend. Pet. App. 68a-77a.

sensitivity that you've shown to its foreign policy concerns." *Id.* at 311.

True to its word that it would keep "firm control" over discovery, Pet. App. 61a, to avoid "trampling on the sovereign and other prerogatives of Indonesia," DA 220 (May 4, 2005 Hrg.), the district court, in a May 3, 2006 order, restricted discovery to specified subject matters and excluded from discovery altogether documents located in Indonesia, although Exxon was permitted to produce documents it anticipated using in its defense (after "any necessary authorization" by two Indonesian government-controlled entities). Pet. App. 84a-85a. Not only did Exxon agree to these discovery provisions in the May 1, 2006 conference preceding the court's issuance of its discovery order, *see, e.g.*, DA 420-23, 436-38, but its counsel represented that he understood both the Indonesian government and the State Department to be "comfortable" with the discovery contemplated by the court. *Id.* at 425-26; *see also* Pet. App. 87a. No discovery of documents in Indonesia ever occurred, and the cut-off date for the production of documents has now passed without incident.

The United States, which is on the case service list, DA 311, advanced no further objections to the continued litigation of respondents' tort claims or to the scope of discovery the district court permitted.[4] Furthermore, the United States entered no appearance in Exxon's appeal to the D.C. Circuit.

4. Exxon argued on appeal that the district court should have dismissed respondents' tort claims as presenting nonjusticiable political questions. The D.C. Circuit did not

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[4] Petitioners append to their petition a February 1, 2007 letter from the Embassy of Indonesia. Pet. App. 185a-86a. Although Exxon alluded to the letter in its petition for rehearing in the D.C. Circuit, that letter was not transmitted by the State Department to the district court or to the court of appeals and is not part of the record below.

reach the merits of Exxon's arguments, however, because it found, in an opinion written by Judge Sentelle, that it had no jurisdiction over the appeal. Pet. App. 4a.

a. First, the court of appeals explained that its jurisdiction under 28 U.S.C. § 1291 was limited to appeals of "final decisions" of the district court. *Id.* at 7a. Acknowledging that "final decisions" also encompass a "small class" of orders that do not necessarily conclude the litigation, but which finally determine a "claim[] of right" separable from, and collateral to, rights asserted in the action, *id.* at 8a (citation omitted), the court held that Exxon's appeal did not fall within the collateral order doctrine's narrow ambit. *Id.* at 7a. For an order to be immediately appealable, it must (1) "conclusively determine the disputed question"; (2) "resolve an important issue completely separate from the merits of the action"; and (3) "be effectively unreviewable on appeal from a final judgment." *Id.* at 8a (quoting *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 468 (1978)). The court of appeals believed that the third requirement—whether the order would be "effectively unreviewable on appeal from final judgment"—was not satisfied. The cases in which courts have found this requirement satisfied, the D.C. Circuit reasoned, have generally involved a denial of a claim of immunity or double jeopardy because such denials entail "the rejection of a defense that would have allowed the defendant to *avoid trial altogether*." *Id.* at 10a. The court found that Exxon had established no such right not to stand trial here. *Id.* at 12a.

The court of appeals emphasized that Exxon had not cited—and the court had not found—"a single case in which a federal appeals court held that denial of a motion to dismiss on political question grounds is an immediately appealable collateral order." *Id.* at 14a. It concluded that if it allowed defendants to appeal every time a district court denied a motion to dismiss based upon political question grounds, it "would be substantially expanding the scope of the collateral order

doctrine," contrary to this Court's admonition "that the doctrine is 'narrow and selective' and 'should never be allowed to swallow the general rule . . . that a party is entitled to a single appeal to be deferred until final judgment.'" *Id.* at 15a-16a (citation omitted).

b. A majority of the court of appeals also rejected Exxon's alternative petition for a writ of mandamus. To grant the petition, the court "would have to hold that the district court 'clearly and indisputabl[y]' exceeded its jurisdiction by refusing to dismiss the case under the political question doctrine." *Id.* at 16a. The D.C. Circuit was unable to so hold.

The court of appeals "disagree[d] with Exxon's contention that there is a conflict between the views of the State Department and those of the district court." *Id.* at 17a. Like the district court, the appellate court viewed the State Department's July 2002 letter "not as an unqualified opinion that this suit must be dismissed, but rather as a word of caution to the district court alerting it to the State Department's concerns." *Id.* Indeed, the court continued, "the fact that the letter refers to 'how the case might unfold in the course of the litigation' shows that the State Department did not necessarily expect the district court to immediately dismiss the case in its entirety." *Id.* at 17a-18a. Accordingly, the court found that it could not say that it was "indisputable" that the district erroneously failed to dismiss respondents' claims, "no matter what level of deference is owed to the State Department's letter." *Id.* at 18a.

The court of appeals recognized that the district court had taken several steps to limit the scope of the litigation in response to the State Department's concerns. *Id.* at 17a. In addition, the absence of case law from other circuits holding in similar circumstances that the complaint must be dismissed underscored, in the majority's view, that Exxon was not entitled to mandamus: "Exxon cites no cases in which a federal

court has held that, in a matter involving like issues and comparable circumstances (*i.e.*, claims by a private party against a private United States corporation), the complaint *must* be dismissed under the political question doctrine. And we are aware of no such authority." *Id.* at 19a.

The court of appeals emphasized, however, that if it had misinterpreted the letter or if the State Department had additional concerns about the litigation, the State Department was "free to file further letters or briefs with the district court expressing its views." *Id.* at 18a.

c. Judge Kavanaugh dissented on the mandamus issue. In his view, "federal courts should dismiss the complaint on justiciability grounds if the Executive Branch has reasonably explained that the suit would harm U.S. foreign policy interests." *Id.* at 34a. He believed that the Executive Branch had provided such an explanation here. *Id.* at 34a-35a. Like the majority, Judge Kavanaugh emphasized that the State Department again would have an opportunity to express its views in the district court. *Id.* at 44a. He assumed that the majority would agree that the district court should dismiss the case if the State Department "reasonably and unambiguously states that litigation of the state-law claims would affect U.S. foreign policy interests." *Id.* at 45a.

5. Exxon's petition for panel rehearing was denied. *Id.* at 90a.

The State Department has expressed no further views to the district court since the dismissal of Exxon's appeal.

REASONS FOR DENYING THE WRIT

The only question presented in the petition is whether the district court's October 2005 order denying Exxon's motion to dismiss respondents' tort claims on political question grounds is immediately appealable under the collateral order doctrine. For the reasons that follow, that question does not merit review.

I. There Is No Circuit Split.

Exxon contends that this Court should grant review to expand the collateral order doctrine to allow a private U.S. corporation to take an immediate appeal from a district court order that, in response to Statements of Interest by the Executive Branch, grants in part and denies in part the corporation's motion to dismiss the plaintiffs' claims on political question grounds. Pet. i, 26. There is no split in the Circuits on this appellate jurisdiction question, and indeed, as the court of appeals noted, not a single case supports Exxon's position. *See* Pet. App. 14a.

In the one other case to raise a similar appellate jurisdiction question, the Fourth Circuit found that it had no appellate jurisdiction. In *Eckert International, Inc. v. Government of the Sovereign Democratic Republic of Fiji*, 32 F.3d 77 (4th Cir. 1994), the Government of Fiji moved to dismiss a breach of contract action in federal court on the basis of sovereign immunity, the act of state doctrine, and the political question doctrine. *Id.* at 78-79. The district court denied the motion, and Fiji appealed. The Fourth Circuit reviewed only Fiji's assertion that the district court erred in denying it sovereign immunity because denials of sovereign immunity are immediately appealable collateral orders. It refused to reach the other issues raised by Fiji. *Id.* at 79.

Exxon asserts that the D.C. Circuit's decision here conflicts with the Second Circuit's decision in *767 Third Avenue Associates v. Consulate General of Socialist Federal Republic of Yugoslavia*, 218 F.3d 152 (2d Cir. 2000). Pet. 16-17. The D.C. Circuit below correctly rejected the analogy. Pet. App. 14a-15a. In *767 Third Avenue*, the Second Circuit held that an "abstention-based stay order" was a "final decision" under 28 U.S.C. § 1291 and thus immediately appealable. *See* 218 F.3d at 159; *see* Pet. App. 15a.

Exxon claims that the Second Circuit accepted an immediate appeal for two "independent" reasons, one of which was that the lower court's ruling under the political question doctrine was immediately appealable, Pet. 17, but its reading of the opinion in *767 Third Avenue* is incorrect. As the D.C. Circuit observed, the Second Circuit's decision mentions the political question doctrine, but only to note that the district court's stay order was based upon political question concerns. Pet. App. 15a (citing *767 Third Avenue,* 218 F.3d at 159). The Second Circuit held that the stay order in *767 Third Avenue* was immediately appealable because it "put the litigants effectively out of court" and thus fell under the rule of *Quackenbush v. Allstate Insurance Co.*, 517 U.S. 706 (1996). That procedural posture is not present here. The Second Circuit's decision does not address, much less support, Exxon's contention that the denial of a motion to dismiss on political question grounds is appealable under the collateral order doctrine.

II. Dismissal of Exxon's Appeal for Lack of Appellate Jurisdiction Was Required by This Court's Precedents.

A review of this Court's precedents applying the collateral order doctrine—which are not discussed in the petition—reveals that the district court's October 14, 2005 decision is not a collateral order.

A. Exxon urges this Court to expand the collateral order doctrine to encompass orders in which a district court had failed to dismiss a case under the political question doctrine where the Executive "has provided a statement of interest warning that the litigation may adversely affect significant U.S. foreign policy interests." Pet. 26; *see also id.* at i. But this Court "has been asked many times to expand the 'small class' of collaterally appealable orders," and it has "instead kept it narrow and selective in its membership." *Will v. Hallock*, 546 U.S. 345, 350 (2006); *Digital Equip. Corp. v. Desktop Direct,*

Inc., 511 U.S. 863, 868 (1994) (describing the conditions for collateral order appeal as "stringent"). Apart from the Court's reluctance to expand the doctrine, allowing an immediate appeal here would run afoul of at least three precepts established in the Court's cases.

1. First, this Court has consistently warned that the issue of appealability under § 1291 "is to be determined for the *entire category* to which a claim belongs, without regard to the chance that the litigation at hand might be speeded, or a 'particular injustic[e]' averted by a prompt appellate court decision." *Digital Equip.*, 511 U.S. at 868 (citation omitted) (emphasis added); *see also Van Cauwenberghe v. Biard*, 486 U.S. 517, 529 (1988); Pet. App. 9a. Thus, "[a]ppeal rights cannot depend on the facts of a particular case." *Carroll v. United States*, 354 U.S. 394, 405 (1957); *accord United States v. MacDonald*, 435 U.S. 850, 857 (1978); *see also Richardson-Merrell v. Koller*, 472 U.S. 424, 439 (1985) (Court has rejected efforts to reduce finality requirement "to a case-by-case determination of whether a particular ruling should be subject to appeal").

Exxon's articulation of the purported "category" that it would add to this Court's small list of immediately appealable collateral orders shows that appealability would not, if Exxon were to prevail, be decided on a categorical basis. Exxon's new "category" is conditional and qualified. A district court order denying a motion to dismiss on political question grounds would become immediately appealable if the Executive has provided a statement of interest and if that statement warns "that the litigation may adversely affect significant U.S. foreign policy interests." Pet. 26; *see also id.* at i.

How clear and strong must the warning be to trigger immediate appealability rights? Here, respondents, the district court, and the court of appeals all disagreed with Exxon that the State Department had expressed the view that the litigation was

such an affront to U.S. foreign policy interests that the case should be dismissed in its entirety. As the court of appeals explained: "We interpret the State Department's letter not as an unqualified opinion that this suit must be dismissed, but rather as a word of caution to the district court alerting it to the State Department's concerns." Pet. App. 17a. Judge Oberdorfer interpreted the State Department's statements of interest in the same way and, to that end, dismissed those claims that he found potentially would have required adjudication of actions taken by the Indonesian government, *id.* at 55a-61a, and strictly managed discovery to focus on "the acts or omissions in the United States by the U.S. Exxon defendants," *id.* at 84a, and to permit no intrusion into Indonesian sovereignty.

If Exxon's proposed category of orders became immediately appealable, appellate courts would have to wrestle in every case with the question whether the Executive had with sufficient clarity warned that the litigation itself—no matter *how* it was conducted—would interfere with U.S. interests and should be dismissed. There would likely be an appeal in every case to decide appealability, undermining the efficiency interest in keeping the collateral order doctrine both narrow and genuinely categorical. *Cf. Powerex Corp. v. Reliant Energy Servs., Inc.*, 127 S. Ct. 2411, 2418 (2007) ("Lengthy appellate disputes about whether an arguable jurisdictional ground invoked by the district court was properly such would frustrate the purpose of § 1447(d) quite as much as determining whether the factfinding underlying that invocation was correct.").

2. Second, as the court of appeals held, Exxon has failed to satisfy the third requirement of the collateral order doctrine—that the order involve a "claim of right," the denial of which would be "effectively unreviewable on appeal from final judgment." Pet. App. 8a, 10a (citations omitted). This Court has emphasized that in assessing whether an order is effectively unreviewable on appeal, "[t]he critical question" is

"whether 'the essence' of the claimed right is a right not to stand trial." *Van Cauwenberghe*, 486 U.S. at 524; *accord Lauro Lines S.R.L. v. Chasser*, 490 U.S. 495, 500 (1989); *see also* Pet. App. 10a; *Will*, 546 U.S. at 350-52 (collaterally appealing party must be vindicating "a right to avoid trial," although even a right to avoid trial is not necessarily sufficient); *Mitchell v. Forsyth*, 472 U.S. 511, 525 (1985) (absolute and qualified immunity share the "essential attribute" that the claim is "an entitlement not to stand trial under certain circumstances"). The court of appeals correctly found here that "Exxon has not established that the political question doctrine confers a 'right not to stand trial' that can justify an immediate appeal." Pet. App. 12a.[5]

As this Court has emphasized, "[t]here is a 'crucial distinction between a right not to be tried and a right whose remedy requires the dismissal of charges.'" *Midland Asphalt Corp. v. United States*, 489 U.S. 794, 801 (1989) (citation omitted). The political question doctrine cannot be characterized, at its core, as conferring a right not to stand trial. Exxon's political question doctrine defense is not premised on the notion that it is immune from suit altogether, but rather that respondents' claims against it are not justiciable in a U.S. court. In *Van Cauwenberghe*, the Court disallowed an immediate appeal from an order denying a motion to dismiss urged on the

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[5] Because sovereign immunity likewise "is an immunity from trial and the attendant burdens of litigation," *Rush-Presbyterian-St. Luke's Med. Center v. Hellenic Republic*, 877 F.2d 574, 576 n.2 (7th Cir. 1989), the courts of appeals, including the D.C. Circuit, agree that interlocutory orders denying sovereign immunity in litigation under the Foreign Sovereign Immunities Act are immediately appealable. *See, e.g., id.*; *Keller v. Central Bank of Nigeria*, 277 F.3d 811, 815 (6th Cir. 2002); *Federal Ins. Co. v. Richard I. Rubin & Co.*, 12 F.3d 1270, 1281-82 (3d Cir. 1993); *Foremost-McKesson, Inc. v. Islamic Republic of Iran*, 905 F.2d 438, 443 (D.C. Cir. 1990). Exxon's attempted analogy to FSIA appeals as supporting an interlocutory appeal here is therefore inapt. *See* Pet. 15-16.

ground that an extradited person is immune from civil process. The Court believed that even if the petitioner were shielded from service of process while detained in the United States following extradition, "the right not to be burdened with a civil trial itself is not an essential aspect of this protection." 486 U.S. at 525. Likewise, in *Lauro Lines*, this Court rejected a collateral-order appeal because, in invoking a contractual forum selection clause as justification for an immediate appeal from the denial of a motion to dismiss, the defendant there was not entitled "to avoid suit altogether." 490 U.S. at 501. As the Court clarified, "an entitlement to avoid suit is different in kind from an entitlement to be sued only in a particular forum." *Id.*

The conditional nature of the appellate rights Exxon invokes underscores that Exxon does not seek to vindicate a right to avoid trial. According to Exxon's conception of appealability, its right to avoid litigation did not exist at the time the complaint was filed against it, but sprang into being only when the United States filed its Statement of Interest expressing concern about the litigation. This Court held that an order was not immediately appealable, however, when the defendants' alleged right to avoid litigation was similarly dependent on the occurrence of later events. *See Will*, 546 U.S. at 354 (contrasting an immediately appealable qualified immunity claim, which is timely from the moment an official is served with a complaint, with the not-immediately appealable judgment bar at issue in *Will*, which could be raised only after a case under the Federal Tort Claims Act had been resolved in the government's favor).

More fundamentally, even if some rights other than the right to avoid trial may be vindicated in an immediate appeal, Exxon's "claim" about potential harm to U.S. foreign relations is not a "claim of right" belonging to *Exxon*. *See Will*, 546 U.S. at 349 (the collateral order doctrine allows immediate appeals of rulings resolving "*claims of right* separable from, and collateral to, rights asserted in the action") (emphasis added)

(quoting *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541, 546 (1949)); *see also* Pet. 14 (recognizing that "*a right*" that is "effectively unreviewable" is "an asserted *right* the legal and practical value of which would be destroyed if it were not vindicated before trial") (emphasis added) (quoting Pet. App. 10a (quoting *Midland Asphalt*, 489 U.S. at 798)). If any "right" is implicated here, it belongs to the United States, not to Exxon. But both the district court and the court of appeals disagreed with Exxon that the State Department had expressed the view that the litigation was such an affront to U.S. foreign policy interests that the case should be dismissed in its entirety, the United States did not intervene and move to dismiss the case as nonjusticiable, the United States did not seek to take an appeal to protect any asserted "right" to prevent the case from proceeding, and the State Department has expressed no further views to the district court since the dismissal of Exxon's appeal, even when invited to do so.

In short, even if the district court erred in proceeding with this case (and we believe that it did not), the court's error—which would not infringe a right of Exxon to avoid trial or, indeed, any right of Exxon at all—can be addressed at the conclusion of the case. To ground a ruling here on whether the particular Statements of Interest submitted by the State Department "confer[] the prized 'right not to stand trial' . . . would flout [the Court's] own frequent admonitions that availability of collateral order appeal must be determined at a higher level of generality." *Digital Equip.*, 511 U.S. at 876-77 (citation omitted).

3. Finally, although the court of appeals held that the first two requirements of the collateral order doctrine were satisfied here, Pet. App. 9a-10a, the court was mistaken in ruling that the political question issue is completely separate from the merits of respondents' claims against Exxon. *Id.* at 10a.

As this Court has said, the political question doctrine "is one of 'political questions,' not one of 'political cases.'" *Baker v. Carr*, 369 U.S. 186, 217 (1962). Deciding whether a matter has been committed by the Constitution to another branch of government requires "case-by-case inquiry," *id.* at 210-11, and a "discriminating inquiry into the precise facts and posture of the particular case." *Id.* at 217. And even though the district court did not need to decide the truth or falsity of respondents' claims against Exxon, the court, in assessing which, if any, of the claims were justiciable, had to analyze the "precise facts and posture" of the case—that is, review the allegations and likely proof—to determine which claims implicated the concerns the State Department had raised and potentially intruded into Indonesian internal affairs. *See* Pet. App. 52a-63a. Thus, its order was not "completely separate from the merits of the action." *Coopers & Lybrand*, 437 U.S. at 468.[6]

Similarly, in *Van Cauwenberghe*, the Court held that a denial of a motion to dismiss on forum non conveniens grounds was not completely separate from the merits, 486 U.S. at 527-29, even though that issue could be decided without assessing the "correctness" of the plaintiff's version of the facts. There, factors relevant to a forum non conveniens determination—such as the relative ease of access to sources of proof, availability of witnesses, and local interest—required the court to "scrutinize the substance of the dispute between the parties" and to consider issues "enmeshed in the merits of the

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[6] Other circuits evaluating similar political question arguments have emphasized the case-by-case, merits-driven nature of the inquiry. *See, e.g.*, *Gross v. German Found. Indus. Initiative*, 456 F.3d 363, 377-78 (3d Cir. 2006) (political question doctrine requires "discriminating inquiry into the precise facts and posture of the particular case") (citation omitted); *Alperin v. Vatican Bank*, 410 F.3d 532, 547 (9th Cir. 2005) ("It is incumbent upon us to examine each of the claims with particularity."), *cert. denied*, 546 U.S. 1137 (2006); *Kadic v. Karadzic*, 70 F.3d 232, 249 (2d Cir. 1995) (relevant considerations must be evaluated "on a case-by-case basis").

dispute." *Id.* at 528. Evaluating factors relevant to a political question determination (*e.g.*, "respect due coordinate branches of government" or the potential for "embarrassment from multifarious pronouncements by various departments," *Baker*, 369 U.S. at 217), likewise would "require significant inquiry into the facts and legal issues presented by [the] case." *Van Cauwenberghe*, 486 U.S. at 529. Even if in some particular instance, the political question determination would not require such an inquiry, this Court, again, decides appealability based on "categories of cases." *Id.* "[I]n the main," the issues that will arise in political question cases where the Executive has submitted a statement of interest "will substantially overlap factual and legal issues of the underlying dispute." *Id.*

B. Exxon obliquely criticizes the panel majority's analysis regarding the availability of mandamus relief, contending that it "illustrates the inadequacy of confining appellate review solely to the extraordinary writ of mandamus procedure in circumstances where a district court does not dismiss a case after receipt of a cautionary Executive statement of interest." Pet. 18; *see also id.* at 12. The petition presents no question, however, regarding whether the court of appeals' denial of Exxon's alternative petition for mandamus relief was correct. *Id.* at i; *see* Supreme Ct. R. 14.1(a) ("Only the questions set out in the petition, or fairly included therein, will be considered by the Court.").[7]

Exxon's contention that the court of appeals issued an "anomalous ruling" that an Executive statement of interest "must explicitly request dismissal to warrant deference," Pet.

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[7] Likewise, this case presents no question under the foreign affairs preemption doctrine. *See* Pet. 22 n.8. Exxon did not assert this ground for dismissal in its first motion to dismiss, which led to the district court's October 14, 2005 order, and the court did not address the issue in that order. The denial of a motion to dismiss on preemption grounds, in any case, would not constitute an immediately appealable collateral order.

17, misstates the D.C. Circuit's decision. The court of appeals did not require that the State Department request dismissal in order for its views to warrant deference. To the contrary, the court cited *Sosa v. Alvarez-Machain*, 542 U.S. 692, 733 n.21 (2004), which suggests that "federal courts should give serious weight to the Executive Branch's view of the case's impact on foreign policy." Pet. App. 18a. The panel majority emphasized, however, that it need not decide what level of deference would be owed to a letter that unambiguously requested the district court to dismiss a case as nonjusticiable because, given the letter in the record, "*no matter what level of deference is owed to the State Department's letter*," the district court did not indisputably err in dismissing some, but not all, of respondents' claims. *Id.* (emphasis added). Thus, Exxon's quarrel is not with the level of deference paid by the district court, but with the outcome of that deference—a fact-bound determination within the discretion of the district court.

This case is simply in the wrong procedural posture for this Court to consider the level of deference that a federal court must accord the Executive's statements of interest. Instead of deciding the level of deference a federal court owes a statement of interest from the Executive, the court of appeals held only that Exxon did not meet the standard for obtaining a writ of mandamus—a "drastic" remedy "to be invoked only in extraordinary situations." *Kerr v. U.S. Dist. Ct. for the N. Dist. of Calif.*, 426 U.S. 394, 402 (1976); *see* Pet. App. 16a (explaining that mandamus was available only if petitioners' right to relief is "clear and indisputable") (quoting *Mallard v. U.S. Dist. Ct. for the S. Dist. of Iowa*, 490 U.S. 296, 309 (1989)). The absence of any case law from other circuits holding that in like circumstances "the complaint *must* be dismissed under the political question doctrine," *id.* at 19a, buttressed the majority's conclusion that Exxon had failed to establish a "clear and indisputable right" to have respondents' claims dismissed as nonjusticiable. *Id.*; *see also id.* at 22a.

Furthermore, Exxon's argument that the limits on availability of mandamus are a reason to be more liberal in allowing collateral order appeals gets it exactly backward: Mandamus is available only in exceptional circumstances precisely so that it does not undermine the strict limits on collateral order appeals. *See Kerr*, 426 U.S. at 403 ("A judicial readiness to issue the writ of mandamus in anything less than an extraordinary situation would run the real risk of defeating the very policies sought to be furthered" by Congress's judgment that appellate review generally be postponed until after final judgment).

The inapplicability of the collateral order doctrine does not mean, of course, that defendants are without appellate recourse in exceptional cases. Exxon has overlooked another important potential avenue for appellate review, a request for certification of an immediate appeal under 28 U.S.C. § 1292(b). *See, e.g.*, *Beaty v. Republic of Iraq*, No. 03-0215, 2007 WL 1169333 (D.D.C. Apr. 19, 2007) (certifying for appeal under § 1292(b) its earlier order denying a motion to dismiss that was based in part on political question grounds). In many cases in which this Court has found an appeal not to satisfy the rigorous standards of the collateral order doctrine, it has emphasized that a party may seek certification under § 1292(b). *See Digital Equip.*, 511 U.S. at 883 (§ 1292(b) serves as "safety valve" for cases not appealable under § 1291); *see also Van Cauwenberghe*, 486 U.S. at 529-30; *Richardson-Merrell*, 472 U.S. at 435; *Firestone Tire & Rubber Co. v. Risjord*, 449 U.S. 368, 378 n.13 (1981). Exxon did not seek certification of an immediate appeal under § 1292(b) from the district court.

C. Exxon concludes by arguing that "[t]he volume and importance of these [kind of] cases," suggest "that it is time for this Court to announce that, if a district court fails to dismiss a case under the political question doctrine where the Executive has provided a statement of interest warning that the litigation may adversely affect significant U.S. foreign policy interests,

an immediate right of appeal exists pursuant to the collateral order doctrine." Pet. 26. In the same breath, however, Exxon negates any need for such a broad expansion of the collateral order, asserting that "it is rare, if ever, that a district court has failed to dismiss a case under such circumstances." *Id.* Thus, not only would allowing Exxon to take an immediate appeal from the district court's interlocutory order violate basic appealability principles, but such an expansion of the collateral order doctrine is, by Exxon's own admission, rarely necessary to protect the U.S. foreign policy interests that Exxon—and not the United States—urged upon the court of appeals.

* * *

Exxon has filed two motions to dismiss, an interlocutory appeal, multiple requests for a stay, and repeated motions for reconsideration from various orders. A recent Exxon motion provoked a stern warning from the district court on July 13, 2007 that "all non-dispositive motions hereinafter filed by either party shall be accompanied by a certificate signed by each counsel . . . that he or she has re-read Federal Rule of Civil Procedure 11 within 10 days before the filing." R. 220 at 6. This case has become a crowning illustration of a point this Court has often made: The conditions for an immediate appeal are "stringent, and unless they are kept so," *Will*, 546 U.S. at 349-50 (citations omitted), the collateral order doctrine will no longer advance § 1291's goals of "judicial efficiency," and "the 'sensible policy of avoid[ing] the obstruction to just claims that would come from permitting the harassment and cost of a succession of separate appeals from the various rulings to which a litigation may give rise.'" *Id.* (internal quotation marks and citation omitted).

CONCLUSION

The petition should be denied.

Respectfully submitted,

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IN THE

Supreme Court of the United States

EXXON MOBIL CORPORATION, ET AL.,
Petitioners,

v.

JOHN DOE I, ET AL.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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SUPPLEMENTAL BRIEF OF PETITIONERS

Pursuant to Supreme Court Rule 15.8, petitioners hereby submit this supplemental brief in response to the brief filed by the Solicitor General.

This Court should grant review to decide whether a party may take a collateral order appeal when the Executive Branch warns that the litigation itself would adversely affect foreign relations, and the district court nonetheless refuses to dismiss the case under the political question doctrine. The Solicitor General's response to this Court's invitation only reinforces the need for the Court's review.

Critically, the Solicitor General agrees with petitioners that the court of appeals erred in holding that a refusal to dismiss on political question grounds can never support a collateral order appeal. The Solicitor General also agrees with petitioners that, at least in certain circumstances, a party may take a collateral order appeal when the very pendency of litigation would adversely affect foreign relations and the district court nonetheless refuses to grant dismissal on political question grounds. Finally, the Solicitor General agrees with petitioners that the court of appeals' categorical bar on collateral order appeals from the denial of dismissal on political question grounds imperils interests of great importance. Those areas of agreement demonstrate that the Court should grant review to correct the court of appeals' erroneous limitation on the availability of collateral order review.

While agreeing with petitioners on those critical points, the Solicitor General nonetheless recommends against the grant of certiorari. The Solicitor General's reasons for recommending against certiorari review, however, do not justify allowing the court of appeals' concededly erroneous and harmful ruling to stand.

A. The Court Of Appeals Erred In Holding That Collateral Order Review Is Categorically Unavailable For A Political Question Claim, And That Error Raises An Issue Of Exceptional Importance

The court of appeals held that, because the political question doctrine does not confer an immunity from suit, a party can never take collateral order appeal from the denial of dismissal on political question grounds. Pet. App. 12a, 16a ("We hold that the denial of a motion to dismiss upon political question grounds is not an immediately appealable collateral order."). That holding is deeply flawed.

When, as here, the first two requirements for collateral order review are satisfied, *see* U.S. Br. 10, the third and remaining requirement is that the issue sought to be appealed would be effectively unreviewable in an appeal following final judgment. *See, e.g.*, *Will v. Hallock*, 546 U.S. 345, 349 (2006). That requirement, contrary to the court of appeals' view, does not turn on whether there is a claim of immunity. The critical question instead, as this Court has explained, is whether a "trial . . . would imperil a substantial public interest." *Id.* at 353. When the Executive Branch warns that the litigation itself en-

dangers the United States's foreign relations interests, a trial necessarily "would imperil a substantial public interest." *Id.*; *see* Pet. App. 135a. This Court's decision in *Will* therefore authorizes a collateral order appeal in this case, and the absence of a claim of immunity from suit should be beside the point.

The Solicitor General agrees that the court of appeals' immunity-only limitation cannot be reconciled with this Court's decision in *Will*. U.S. Br. 12. As the Solicitor General explains, that rigid rule would bar collateral appeals in separation-of-powers cases that satisfy the *Will* standard but that do not involve a claim of immunity. *Id.* at 12-14. In particular, the Solicitor General observes, the court of appeals' immunity-only rule would deny a collateral order appeal from a district court order refusing to dismiss a case under the rule announced in *Totten v. United States*, 92 U.S. 105 (1875). It would also preclude a collateral order appeal when a district court holds that a task force composed of cabinet-level officers and chaired by the Vice President is subject to public disclosure requirements. And it would foreclose collateral order review of a political question claim when the Executive Branch warns that the pendency of litigation would adversely affect foreign relations and explicitly seeks dismissal on that basis. *See* U.S. Br. 12-14.

The harmful consequences that would follow from the court of appeals' approach are self-evident. As the Solicitor General recognizes (U.S. Br. 14), the court of appeals' rule would allow litigation to continue even when it would "imperil a substantial pub-

lic interest." *Will*, 546 U.S. at 353. And it would foreclose collateral order review even in cases in which the Executive Branch explicitly seeks dismissal because the pendency of litigation would damage foreign relations.

B. The Solicitor General's Disagreement With Petitioners On The Correct Collateral Order Standard Affords No Reason To Deny Review

The Solicitor General disagrees with petitioners' position that collateral order review is available when the Executive Branch warns that the pendency of litigation would adversely affect foreign relations. In the Solicitor General's view, a collateral order appeal based on such a warning should be available only when the Executive Branch explicitly seeks dismissal of the suit on that basis. U.S. Br. 14. The Solicitor General's approach cannot be squared with *Will*. When a district court proceeds with litigation notwithstanding an Executive Branch warning that the pendency of litigation will damage foreign relations, continuation of the litigation necessarily "imperil[s] a substantial public interest," *Will*, 546 U.S. at 353, regardless of whether the Executive Branch explicitly seeks dismissal on that basis. Accordingly, under *Will*, when the Executive Branch issues such a warning and the defendant seeks dismissal on that basis, a district court's refusal to dismiss should be subject to a collateral order appeal.

The Solicitor General offers no explanation of why an explicit request for dismissal by the Executive Branch could be necessary to satisfy the *Will*

standard. And there is no precedent for conditioning the availability of a collateral order appeal on an explicit request for a dismissal. To be sure, when a dismissal is sought based on foreign-relations concerns but is denied by the district court, it is fully appropriate to condition the availability of a collateral order appeal on the Executive Branch's expert *foreign-policy* judgment that the litigation will adversely affect foreign relations. But there is no comparable basis in the concerns underlying collateral order review to condition the availability of a collateral order appeal on the Executive Branch's *legal* (or tactical) judgment concerning whether to seek a dismissal.*

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* The government recently urged this Court to grant review of a court of appeals' decision permitting continuation of a lawsuit alleging that certain corporations aided and abetted violations of international law committed by the South African government. *See* U.S. Br., No. 07-919, *Am. Isuzu Motors, Inc. v. Ntsebeza*. In urging this Court to grant review notwithstanding that the case was in an interlocutory posture, the government explained that the mere pendency of the lawsuit raised significant foreign relations concerns. *See id.* at 18-22. The government reached that conclusion even though the State Department's statement-of-interest in that case had not explicitly sought a dismissal. *See* Pet. App. 193a-196a. While that case involved a request for interlocutory review by this Court rather than a collateral order appeal to a court of appeals, it demonstrates that the mere pendency of a lawsuit can raise significant foreign policy concerns and thus justify a collateral order appeal under *Will*, regardless of whether the Executive Branch's statement of interest explicitly seeks a dismissal.

Whatever the ultimate merits of the Solicitor General's recommended approach, however, the crucial point is this: The court of appeals has issued a ruling that precludes collateral order review under *both* petitioners' standard and the Solicitor General's standard; and the question whether the court of appeals' standard, petitioners' standard, or the Solicitor General's standard should govern this area is one of exceptional importance. This Court therefore should grant the petition and resolve on the merits which of the three competing approaches states the correct collateral order rule in the context of this case.

C. This Case Squarely Raises The Question Presented By The Petition

The Solicitor General argues (U.S. Br. 15-16) that the question raised by the petition—whether a party may take a collateral order appeal when the Executive Branch warns that the pendency of the litigation will adversely affect foreign relations—is not squarely presented by the case. According to the Solicitor General, the court of appeals did not resolve that issue. The Solicitor General is mistaken.

Petitioners' position is that a party may take a collateral order appeal when the Executive Branch warns that the pendency of litigation would harm foreign relations and the district court nonetheless refuses to grant dismissal on political question grounds. The court of appeals rejected that argument, holding instead that a district court' refusal to dismiss on political question grounds can never be appealed under the collateral order doctrine because

the political question doctrine does not confer an immunity from suit. Pet. App. 9a-16a. That holding definitively resolved the question presented by petitioners, making this case an appropriate vehicle for addressing the issue.

The Solicitor General contends (U.S. Br. 15-16) that the court of appeal did not resolve the question presented by petitioners because the court did not accept the question's factual predicate—*viz.*, that the Executive Branch had warned that the litigation itself would endanger foreign relations. That contention reflects a misreading of the court of appeals' opinion. In the portion of its opinion addressing the applicability of the collateral order doctrine (*see* Pet. App. 9a-16a), the court of appeals did not address whether the Executive Branch had warned that the pendency of the litigation would imperil foreign relations. Instead, the court of appeals dismissed the appeal on the categorical ground that "the denial of a motion to dismiss based upon political question grounds is not an immediately appealable collateral order." *Id.* at 16a.

In contending that the court of appeals disputed the factual predicate of the question presented, the Solicitor General relies exclusively on statements in the court of appeals' discussion of the availability of *mandamus* review, not its discussion of collateral order review. *See* U.S. Br. 15-17; Pet. App. 17a-18a. Moreover, even in its discussion of mandamus review, the court of appeals concluded only that the State Department had not "*unambiguously*" requested that the district court "dismiss" the case, and that it thus was not "indisputable" that the dis-

trict court had erroneously failed to dismiss the case. *Id.* at 18a. Those statements are not inconsistent with the factual predicate for petitioners' collateral order appeal. The factual predicate is not that the State Department made an "unambiguous" request to "dismiss" the case, or that the district court "indisputably" erred in declining to dismiss. Instead, the factual predicate is that the Executive Branch had warned that the litigation itself would adversely affect foreign relations.

Moreover, the factual predicate for petitioners' collateral order appeal is plainly present. The State Department warned that the "adjudication of this lawsuit at this time would in fact risk a potentially serious adverse impact on significant interests of the United States, including interests related directly to the on-going struggle against international terrorism." Pet. App. 133a. Specifically, the State Department warned "that adjudication of this case will be perceived in Indonesia as a U.S court trying the [Government of Indonesia] for its conduct of a civil war," and that the "lawsuit could potentially disrupt the on-going and extensive United States efforts to secure Indonesia's cooperation in the fight against international terrorist activity." *Id.* at 134a-135a.

As the Solicitor General notes (U.S. Br. 15-16), the district court subsequently dismissed the claims against a natural gas company owned by the Indonesian government and also dismissed the federal claims premised on alleged international-law violations of the Indonesian government. That narrowing of the suit, however, did not remove the factual predicate for a collateral order appeal. The district

court declined to dismiss the state-law claims against petitioners, and as Judge Kavanaugh explained, those claims "pose just as much a threat to U.S. foreign policy interests as the federal-law claims." Pet. App. 37a. That is because, as Judge Kavanugh observed, the state-law claims—no less than the federal claims—require respondents to "prove that members of the Indonesian military engaged in acts of violence in Indonesia against Indonesian citizens," squarely implicating the foreign policy concerns identified in the State Department's letter. *Id.* at 36a. It bears noting in this regard that this Court has specifically left open the possibility that a stay of proceedings in the district court may be warranted "in light of further developments" in that court. Letter from Clerk, January 7, 2008, denying without prejudice Application No. 07A546, *Exxon Mobil Corp. v. Doe*, No. 07-81 (Roberts, C.J., in chambers).

The Solicitor General observes that the court of appeals "reasonably regarded" the case as one in which the Executive Branch had not warned that the litigation itself would harm foreign relations. U.S. Br. 8. As explained above, however, the court of appeals did not reach that conclusion, but instead assessed only whether the district court had "indisputably" erred in declining to dismiss the case based on the Executive Branch statement. And in any event, even assuming *arguendo* that the court of appeals' had reached that conclusion, the Solicitor General does not state that the court of appeals was correct in doing so. Significantly, the Solicitor General does not take issue with Judge Kavanaugh's recognition that respondents' state-law claims neces-

sarily require putting the actions of the Indonesian military on trial. A collateral order appeal is available in such circumstances to avoid the ensuing harm to foreign relations.

D. Mandamus Is Not A Substitute For A Collateral Order Appeal

The Solicitor General contends (U.S. Br. 19) that review is unwarranted because, if the court of appeals had agreed with petitioners' understanding of the State Department's letter, the court would have granted mandamus relief. That contention lacks merit. The court of appeals did not indicate that it would have granted mandamus relief if it agreed that the Executive Branch had warned that the litigation itself would harm foreign relations. The court of appeals instead held that a necessary precondition for even considering a mandamus remedy was an *unambiguous* Executive Branch *request for dismissal*. Pet. App. 18a.

Moreover, under the court of appeals' approach, even an unequivocal request for dismissal by the Executive Branch would fail to trigger the grant of mandamus relief. Rather, the court emphasized that mandamus would be warranted only if a district court's error were "indisputable," and the court indicated that petitioners could not satisfy that standard because no case had ever held that a dismissal on political question grounds is required when a private party sues a private corporation. *Id.* at 18a-19a. That reason for denying mandamus relief would remain present even if the Executive Branch had unequivocally requested dismissal. Accordingly, far

from providing a basis for denying review, the court of appeals' approach to mandamus relief highlights the inadequacy of mandamus as a means of obtaining review in the context of this case—and correspondingly underscores why collateral order review is necessary.

CONCLUSION

The petition for a writ of certiorari should be granted.

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No. 07-81

IN THE

Supreme Court of the United States

EXXON MOBIL CORPORATION, ET AL.,
Petitioners,

v.

JOHN DOE I, ET AL.
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

REPLY IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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INTRODUCTION

The question presented is not, as Respondents argue, whether the collateral order doctrine should be "expanded." It is whether the traditional standards of the collateral order doctrine are satisfied when a court refuses to dismiss an action involving a foreign sovereign in the face of assertions by the Executive that the continued exercise of jurisdiction would have a serious adverse impact on significant U.S. interests.

The Court of Appeals determined that the first two requirements of the collateral order doctrine are met: the decision below conclusively determined an im-

portant issue separate from the merits of the litigation. At issue is whether the order is effectively unreviewable on appeal from the final judgment. That condition is met in this case.

The briefest review of this litigation demonstrates that any harms that flow from continued jurisdiction could not be cured by appeal from final judgment. Indonesia is the most populous Muslim-majority country in the world and rich in natural resources. Indonesia is a focal point for U.S. initiatives in the on-going war against Al Quaida and other dangerous terrorist organizations, and it plays a vital role in supplying natural resources and business opportunities to the United States. In reaction to this lawsuit, the Indonesian government has stated that it "cannot accept the extra territorial jurisdiction of a United States court over an allegation against an Indonesian government, cq the Indonesian military, for operations taking place in Indonesia" and that "continuation of the Lawsuit" is unacceptable. Informed by the Indonesian objections, on four occasions between 2002 and 2005, the United States warned that adjudication of the lawsuit would risk a potentially serious impact on the United States' ability to work with Indonesia on human rights issues, on the war on terror, and on foreign investments in the extractive industries.

The question of whether unacceptable damage to U.S. interests will result from continuation of this litigation calls for appellate review now. An appeal after judgment will be unable to repair the damage to U.S. interests caused by continuation of the litigation. Opportunities for constructive engagement with Indonesia in tracking down terrorists, improving human rights or in stimulating foreign invest-

ment that are lost or hampered during the pendency of the lawsuit cannot be restored once they are gone. As recently as February 2007, after the Court of Appeals' decision below, the Indonesian government "reaffirmed" its objections. Contrary to Respondents' contention, the United States government has not changed its position or indicated that it is "comfortable" with the litigation proceeding.

The cause for concern over this litigation of the Executive Branch and the Indonesian government was apparent to Judge Kavanaugh in dissent below: "[P]roof [of wrongdoing by the Indonesian military] is a necessary component of establishing either Exxon's vicarious liability for the alleged violent acts or Exxon's direct liability for negligently hiring the alleged bad actors." (App. 43a.) This fatal problem should have prompted dismissal of the entire case, but the District Court instead ruled that claims based on District of Columbia and Delaware law could proceed, notwithstanding that the case requires litigation of alleged acts of the Indonesian military against Indonesian citizens on Indonesia soil. The Court of Appeals would not revisit that conclusion because the Executive had not explicitly requested dismissal; its decision conflicts with this Court's direction that courts should give "serious weight," *Sosa v. Alvarez-Machain*, 542 U.S. 692, 733 n.21 (2004), to the Executive Branch's view of a case's impact on foreign policy as the Executive's "considered judgment," *Republic of Austria v. Altmann*, 541 U.S. 677, 702 (2004).

This case is hardly unique. The federal courts face growing numbers of claims like those in this case, alleging responsibility of U.S. corporations for acts by foreign governments abroad. When a district court

decides to permit a case like this to proceed after the Executive Branch has stated significant concerns with the continuation of the litigation, appellate review should be available to challenge that ruling.

REASONS FOR GRANTING THE WRIT

I. THE DENIAL OF PETITIONERS' MOTION TO DISMISS ON POLITICAL QUESTION GROUNDS IS EFFECTIVELY UNREVIEWABLE AFTER FINAL JUDGMENT.

A. The Foreign Policy Concerns Expressed by the Executive Branch and the Indonesian Government Are Implicated by the Continuation of this Lawsuit.

The objection to this litigation upon which the Executive based its statement of interest, and the principal objection of the Indonesian government, is that the litigation is an extraterritorial assertion of U.S. jurisdiction over the acts of a sovereign government. (App. 139a; 184a.) As the Executive stated, "We anticipate that adjudication of this case will be perceived in Indonesia as a U.S. court trying the GOI for its conduct of a civil war in Aceh." (App. 134a.) The Executive's Statement of Interest warned of the multiple ways in which the "adjudication" of the lawsuit could harm U.S. interests:

- "[t]his lawsuit . . . may also diminish our ability to work with the Government of Indonesia ("GOI") on a variety of important programs, including efforts to promote human rights in Indonesia";
- "This lawsuit could potentially disrupt the ongoing and extensive United States efforts to

secure Indonesia's cooperation in the fight against international terrorist activity"; and

- "This litigation appears likely to further discourage foreign investment," which "in turn could have decidedly negative consequences for the Indonesian economy," "in conflict with" a number of important U.S. goals and policies.

(App. 133a-138a.) In a February 2007 diplomatic note to the State Department, Indonesia "reaffirmed" its opposition to the litigation on sovereignty grounds. (App. 185a.) It also lamented that the litigation would risk the hard-won peace that has finally come to Aceh. (App. 186a.)

Respondents invite the Court to conclude, from silence, that the Executive has spontaneously withdrawn its concerns about the lawsuit. (Opp'n 6-7, 17.) However, the record shows consistent statements by the Executive warning of the "potentially serious adverse impact on significant interests of the United States" posed by adjudication of the lawsuit. (App. 133a, 142a, 166a, 173a, 174a, 183a.) There is nothing in the record withdrawing those statements, and no statement from the United States that it is now "comfortable" with the litigation.

Respondents take out of context an Assistant United States' Attorney's remarks from a December 2005 hearing. (Opp'n 6-7.) These remarks were mere courtesies at the end of a brief hearing, and were made at a time when the federal claims had been dismissed, no complaint was pending, no discovery plan was in place, and Respondents had yet to move to amend their complaint. The Executive has repeatedly stated its position, and it is inappropriate to accept Respondents' invitation to draw conclusions

from the absence of additional confirmations of that position.[1] *See First Nat'l City Bank v. Banco Nacional de Cuba*, 406 U.S. 759, 764 (1972); *Republic of the Phil. v. Marcos*, 818 F.2d 1473, 1488 n.20 (9th Cir. 1987). It is particularly inappropriate to draw conclusions from silence when the District Court has ordered Petitioners not to raise justiciability as a defense to any amended complaint. (District Court Docket No. 118 at 1.)

B. The Remaining Claims Require Adjudicating the Blameworthiness of Indonesian Soldiers.

As Judge Kavanaugh recognized (App. 43a), to prevail at trial, Respondents must prove that the Indonesian military committed the acts for which they seek to hold Petitioners liable. (District Court Docket No. 129-2 ¶¶ 1, 58-62, 67-77.) In the words of Respondents' counsel in May 2005, referring to two of the Respondents:

> They were killed by the Indonesian military, and we will shortly amend the complaint to add those allegations. They were killed by the military, we believe, that were operating on behalf of Exxon Mobil, as the other plaintiffs were injured.

(App. 171a.) When asked to react to Respondents' position, the Assistant United States Attorney stated:

> I heard them say that the killings were done by the Indonesian military, and that they plan to

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[1] The Executive and Legislative Branches have recently confirmed their strong support for the peace process in Aceh. *See* November 20, 2006 Joint Statement Between the United States and the Republic of Indonesia, *available at* http://www.whitehouse.gov/news/releases/2006/11/20061120-3.html; *see also* H.R. Res. 238 (passed September 17, 2007).

> amend the complaint to add a claim regarding that. That's exactly the concern that underlies Mr. Taft's letter.

(App. 174a.)

Against this backdrop, Respondents' related suggestions that this litigation is merely a private dispute between themselves and "Exxon security personnel" (Opp'n 2); that the District Court has dismissed any claim that "would have required adjudication of actions taken by the Indonesian government" (Opp'n 14); that the implications of this case for U.S. foreign policy are factual issues "'enmeshed in the merits of the dispute'" and therefore inappropriate for resolution under the collateral order doctrine (Opp'n 18-19 (citation omitted)); or that the Indonesian government and the State Department are now "comfortable" with the case because of the restrictions on discovery imposed by the District Court (Opp'n 7) are not well founded. As the State Department observed, "All of the human rights abuses and injuries alleged in the complaint refer to conduct claimed to have been committed by the military and police forces of the GOI." (App. 134a-135a.) In fact, two days after it filed its opposition to certiorari, Respondents filed a motion in the District Court seeking to compel Petitioners to provide testimony regarding specific details of Indonesian military deployments and movements. (District Court Docket No. 227-2 at 11-12 (moving to compel testimony of Petitioners' Fed. R. Civ. P. 30(b)(6) witness regarding "[p]atrols or sweeping conducted by the armed forces, police forces, or any other person, corporation, or individual providing security at the Arun Project" for thirteen specified times and locations).) There is nothing "fact-bound"

(Opp'n 2) about the direct and inescapable conclusion that Respondents' claims cannot be addressed without making findings about the actions of the Indonesian government and military.

C. Application of the Collateral Order Doctrine to this Case Is Consistent with this Court's Precedent.

Respondents' arguments in support of their assertion that dismissal of Petitioners' appeal was required by this Court's precedent (Opp'n 12-19) do not withstand scrutiny. Respondents argue (1) that the rule advanced by Petitioners is unacceptably dependent on the facts of a particular case and cannot be properly "categor[ized]" for purposes of the collateral order doctrine (Opp'n 13-14); (2) that in this case the factual analysis is tied to, and inseparable from, the merits of the underlying claims (Opp'n 17-19); and (3) that only a "claim of right" can satisfy the collateral order doctrine, and that Petitioners do not have a "claim of right," because "[i]f any 'right' is implicated here, it belongs to the United States, not to Exxon," (Opp'n 14-17.) None of these arguments is persuasive.

For the reasons set out above, the proposed category of cases suitable for review under the collateral order doctrine is neither inappropriately dependent on the facts nor inseparable from the merits. The category of claims that would and do fit within the Court's collateral order jurisprudence are claims against U.S. entities involving the acts of foreign sovereigns abroad that the Executive Branch believes should not be litigated due to the harm to significant U.S. interests that would arise from the litigation process. Where, as here, the Executive concludes

that a claim cannot be litigated without creating the risk of a serious adverse impact on significant foreign policy interests of the United States, the collateral order doctrine should provide a direct appeal of the denial of a motion to dismiss on political question grounds, because the risk identified by the Executive cannot be avoided or corrected on appeal after judgment. The questions Respondents pose about "[h]ow clear and strong must the warning be" (Opp'n 13) go to the merits of the political question claim; they do not relate to whether the denial of a motion to dismiss on political question grounds may be appealed. *See Van Cauwenberghe v. Biard*, 486 U.S. 517, 524 (1988) (the question "is not whether petitioner's underlying claim of immunity is meritorious, but whether the denial of petitioner's motion to dismiss on grounds of immunity from service of process is immediately appealable.").[2]

Respondents also contend that only a "claim of right" can satisfy the collateral order doctrine, and that Petitioners do not have a "claim of right," because "[i]f any 'right' is implicated here, it belongs to the United States, not to Exxon." (Opp'n 14-17.) This theory is misguided. First, Petitioners are the

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[2] Respondents' contention that the court of appeals "was mistaken in ruling that the political question issue is completely separate from the merits of respondents' claims against Exxon" (Opp'n 17) cannot be reconciled with their claims. As every court to examine this case has concluded, Petitioners' liability is entirely dependent on an evaluation of the acts of the Indonesian military. Whether the allegations actually have merit or not is irrelevant; under any set of facts and circumstances, in order to adjudicate Respondents' claims, the parties will have to establish facts concerning the actions of the Indonesian soldiers alleged to have committed tortious acts, and the court and trier of fact will have to make judgments about those actions.

parties below and are entitled to bring the views of the Executive to the courts' attention. Second, the collateral order doctrine does not hinge on individual claims of right, but on the nature of the interest that underlies the right asserted. As Respondents acknowledge (Opp'n 13), the collateral order doctrine applies to categories of orders that may affect a "substantial public interest." *See Will v. Hallock*, 546 U.S. 345, 353 (2006). For example, in absolute immunity cases, there is a substantial public interest "rooted in the separation of powers." *Id.* at 352. Similarly, a government official who invokes the collateral order doctrine to protect his claimed right to qualified immunity does so not only to avoid trial for himself, but to protect the public interest in having government officers comforted by the knowledge that an immediate appeal will be available whenever district courts deny their immunity defenses. *See Mitchell v. Forsyth*, 472 U.S. 511, 526-27 (1985) (discussing rationale for qualified immunity). It is the "particular value of a high order" that matters under the collateral order doctrine, not the interest of the defendant in "mere avoidance of trial." *Will*, 546 U.S. at 352. Here, the value of high order is deference to the Executive's view of the impact of the case on foreign policy. *See Sosa*, 542 U.S. at 733 n.21.

Unlike the Court of Appeals below, the Second Circuit agrees that a case such as this is subject to the collateral order doctrine. In *767 Third Avenue Associates*, the Second Circuit reviewed the district court's failure to dismiss a lawsuit despite concerns offered by the State Department about the effect of the litigation on U.S. foreign policy interests. *767 Third Ave. Assocs. v. Consulate Gen. of Socialist Fed. Republic of Yugo.*, 218 F.3d 152, 159 (2d Cir. 2000).

Respondents argue that *767 Third Avenue Associates* is inapposite, because the Second Circuit concluded that the district court's order was appealable under the abstention-based stay order doctrine. (Opp'n 11-12.) However, the Second Circuit also held that the denial of the motion to dismiss on political question grounds was "a holding that 'conclusively determines an issue that is separate from the merits,' and is therefore *also* appealable under the collateral order doctrine." *767 Third Ave. Assocs.*, 218 F.3d at 159 (citation omitted) (emphasis supplied). The Second Circuit's alternative holdings each have separate precedential value, *see Woods v. Interstate Realty Co.*, 337 U.S. 535, 538 (1949), one of which is in conflict with the decision below.[3]

II. THE COURT OF APPEALS' RULING CONFLICTS WITH *SOSA* AND *ALTMANN*.

Respondents do not dispute that cases such as theirs, which seek to litigate extraterritorial claims of noncitizens regarding the conduct of foreign governments, are increasingly common. (Pet. 23-26; Opp'n 21-22.) In light of this trend, it is particularly significant that the decision below departs from this Court's guidance in *Sosa* and *Altmann* on the deference owed to Executive statements of interest. (Pet. 17-22.)

Respondents' attempts to justify the decision below under *Sosa* (they do not cite *Altmann*) fail. As discussed above, positions taken by the United States clearly and directly opine that the conduct of this

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[3] *Eckert International, Inc. v. Fiji*, 32 F.3d 77 (4th Cir. 1994), cited by Respondents, is irrelevant here because there was no Executive statement of interest in that case.

litigation threatens significant U.S. interests. The majority below clearly distinguished between the statement of interest submitted in this case, which it interpreted as "a word of caution to the district court," and a hypothetical statement of interest that provides "an unqualified opinion that this suit must be dismissed." (App. 17a.) The court then directly equated a letter that "unambiguously requests that the district court dismiss a case as a non-justiciable political question" with the *Sosa* standard (by citing *Sosa*), and suggested that "the letter before us in the record" was not such a letter and therefore not entitled to the deference required under *Sosa*. (App. 18a.) Nothing in *Sosa* or *Altmann* suggested that deference is contingent on an Executive request for dismissal, and *Sosa*'s reference to the statement of interest in the *South African Apartheid* litigation—which did not contain an express request for dismissal—demonstrates the error in the majority's approach. (Pet. 18-20; App. 193a-196a.)

Beaty v. Republic of Iraq, 480 F. Supp. 2d 60, 82 (D.D.C. 2007), which Respondents fail to address, is the best evidence that the opinion of the Court of Appeals, if left standing, will lead courts to conclude that the *Sosa* standard does not apply to statements of interest unless they expressly request dismissal.

In light of the growing trend by noncitizens using United States courts to challenge foreign governments' actions, the peculiar decision of the majority below under the wrong appellate review standard is another reason to grant the writ.

CONCLUSION

Petitioners request that the petition for a writ of certiorari be granted.

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October 23, 2007

No. 07-81

In the Supreme Court of the United States

EXXON MOBIL CORP., ET AL., PETITIONERS

v.

JOHN DOE, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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QUESTION PRESENTED

Whether a district court's denial of a private defendant's motion to dismiss state-law tort claims on the ground that the litigation will interfere with the Nation's foreign relations is immediately appealable under the collateral order doctrine.

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In the Supreme Court of the United States

No. 07-81

EXXON MOBIL CORP., ET AL., PETITIONERS

v.

JOHN DOE, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

This brief is submitted in response to the order of this Court inviting the Solicitor General to express the views of the United States. In the view of the United States, the petition for a writ of certiorari should be denied.

STATEMENT

This case concerns the application of the collateral order doctrine of appellate review to a district court order declining to dismiss state-law tort claims on the basis of a private defendant's assertion that the litigation could interfere with the United States' foreign relations.

1. Petitioners are corporations that operate a natural gas extraction and processing facility in the Aceh province of Indonesia pursuant to a contract with the Indonesian government. Respondents are eleven Indonesian villagers from Aceh who brought suit under the Alien Tort Statute (ATS), 28 U.S.C. 1350, the Torture Victims Protection Act

(TVPA), 28 U.S.C. 1350 note, and common law tort principles, alleging that petitioners' security forces (at least some of whom were members of the Indonesian military) had committed murder, torture, sexual assault, battery, false imprisonment, and other torts.

a. After petitioners filed a motion to dismiss the complaint as presenting nonjusticiable political questions, the district court solicited the views of the State Department as to whether adjudication of respondents' claims would interfere with the United States' conduct of foreign policy but did not request the views of the Department on the legal issues before the court. The United States' July 2002 statement of interest attached a letter from the State Department (see Pet. App. 133a-138a), which stated at the outset that "adjudication of this lawsuit at this time would in fact risk a potentially serious adverse impact on significant interests of the United States, including interests related directly to the on-going struggle against international terrorism." *Id.* at 133a. The letter further stated that adjudication "may also diminish our ability to work with the Government of Indonesia (GOI) on a variety of important programs, including efforts to promote human rights in Indonesia." *Ibid.*

At the same time, the letter stated that the Department's views were "necessarily predictive and contingent on how the case might unfold in the course of litigation," depending on such factors as "the nature, extent, and intrusiveness of discovery" and "the degree to which the case might directly implicate matters of great sensitivity to the Government of Indonesia and call for judicial pronouncements on the official actions of the GOI with respect to the conduct of its military activities in Aceh." Pet. App. 134a & n.1. The State Department raised particular concern that "adjudication of this case will be perceived in Indonesia as

a U.S. court trying the [Government of Indonesia] for its conduct of a civil war in Aceh," *id.* at 134a, and undermine Indonesia's stability by deterring foreign investment, thereby depriving the Indonesian Government of financial resources, *id.* at 136a-137a.

b. A year later, in July 2003, the United States filed a supplemental statement of interest addressing legal arguments relating to the defendants' motion to dismiss, arguing that the ATS did not permit the court to infer a cause of action, especially for conduct occurring in a foreign country. Pet. App. 141a-163a. The statement of interest referred to the foreign policy concerns that had been articulated in the government's earlier filing and informed the court that "[t]hose concerns can be avoided by holding, as the United States contends, that the ATS does not create an independent right of action." *Id.* at 142a. The supplemental statement noted in particular the government's concern that ATS claims such as respondents' "involve our courts in deciding suits between foreigners regarding events that occurred within the borders of other nations, and in the exercise of foreign governmental authority." *Id.* at 157a.

2. In October 2005, after this Court issued its opinion addressing the ATS in *Sosa* v. *Alvarez-Machain*, 542 U.S. 692 (2004), the district court ruled on petitioners' motion to dismiss. In its discussion, the court specifically addressed the United States' statements of interest, noting both the government's concern that the litigation risks a "potentially serious adverse impact" on the Nation's foreign relations and the fact that State Department's assessment was "necessarily predictive and contingent" on such questions as the extent of discovery and whether adjudication of the suit would require "judicial pronouncements on the official actions of the [Government of Indonesia] with respect to its military activities in Aceh." Pet. App. 50a (quoting July

2002 statement of interest). The district court's order dismissed all of respondents' claims under the ATS and TVPA as well as all of their claims against PT Arun LNG Co. (PT Arun), "an entity that is 55% owned by Indonesia's state-owned oil and gas company." *Id.* at 52a-61a.

To the extent that respondents based their ATS claims on an aiding-and-abetting theory of liability, the district court rejected that theory for the same reasons articulated by the district court in *In re South African Apartheid Litigation*, 346 F. Supp. 2d 538, 549-551 (S.D.N.Y. 2004), aff'd in part, vacated in part, and remanded, 504 F.3d 254 (2d Cir. 2007), aff'd under 28 U.S.C. 2109, No. 07-919 (May 12, 2008). In particular, the district court pointed to "'the admonition in *Sosa* that Congress should be deferred to with respect to innovative interpretations' of the Alien Tort Statute" and "the collateral consequences and possible foreign relations repercussions that would result from allowing courts in this country to hear civil suits for the aiding and abetting of violations of international norms across the globe." Pet. App. 53a (quoting *South African Apartheid Litig.*, 346 F. Supp. 2d at 550-551). The district court further concluded that adjudicating respondents' ATS claims based on allegations regarding genocide and crimes against humanity would require the court to "evaluate the policy or practice of [a] foreign state" and that "assessing whether Exxon is liable for these international law violations would be an impermissible intrusion in Indonesia's internal affairs." *Id.* at 55a. The district court held that respondents' other ATS and TVPA claims also failed. *Id.* at 54a, 55a-59a.

In addition, the district court dismissed as "non-justiciable" all claims against defendant PT Arun because of the risk that adjudication of such claims would interfere with the internal affairs of Indonesia and disrupt relations between the United States and Indonesia. Pet. App. 61a.

The court rejected, however, petitioners' assertion that the complaint was nonjusticiable in its entirety and denied petitioners' motion to dismiss the state-law tort claims against the remaining defendants. *Ibid.* The court summarized its ruling as having tailored respondents' claims "to a narrower question: did U.S. corporations in their effort to secure their pipeline in Indonesia violate U.S. state tort law?" *Id.* at 63a. The court expressed the view that "[l]itigation and discovery on this issue, if conducted with care, should alleviate the State Department's concerns about interfering with Indonesia's sovereign prerogatives." *Ibid.*

Although the district court declined to dismiss the suit in its entirety, the court stressed that the remaining state-law claims would be allowed to proceed, "with the proviso" that "the parties are to tread cautiously." Pet. App. 61a. In particular, discovery was to be "conducted in such a manner so as to avoid intrusion into Indonesian sovereignty" and would remain under the court's "firm control." *Ibid.* The United States had, in July 2005, before the district court's ruling on the motion to dismiss, raised a specific objection to the broad discovery sought by respondents, informing the court that "[t]he proposed discovery plan triggers the concerns set forth in the State Department letter of July 2002, which remain valid today," *id.* at 183a. In an order dated May 3, 2006, the district court specifically referred to those concerns and explained that the court would address them by "avoid[ing] discovery in Indonesia." *Id.* at 87a. The court further declined to require respondents to search for, review, and prepare a log of responsive documents located in Indonesia. *Id.* at 88a.

3. Petitioners appealed from the district court's interlocutory order denying their motion to dismiss the entire complaint as nonjusticiable. Petitioners argued that the denial of their motion to dismiss was immediately appeal-

able under the collateral order doctrine. In the alternative, petitioners sought a writ of mandamus directing the district court to dismiss the remaining claims.

The court of appeals dismissed petitioners' appeal for lack of jurisdiction, and a majority of the panel concluded that petitioners had not satisfied the requirements for mandamus. Pet. App. 3a-22a. The court of appeals acknowledged that the district court's ruling satisfied the first two requirements of the collateral order doctrine: that the order "conclusively determine the disputed question" and that it "resolve an important issue completely separate from the merits of the action." *Id.* at 8a-9a (quoting *Coopers & Lybrand* v. *Livesay*, 437 U.S. 463, 468 (1978)). The court found that the appeal faltered on the third requirement, that the "order in question will be 'effectively unreviewable on appeal from final judgment.'" *Id.* at 10a (quoting *Coopers & Lybrand*, 437 U.S. at 468). To satisfy that element, it is not enough that the defendant claims a "right to avoid trial"; rather, the "'interest in avoiding trial' must be buttressed by 'some particular value of a high order.'" *Id.* at 11a (quoting *Will* v. *Hallock*, 546 U.S. 345, 352 (2006)). The court noted that "*Will* did refer to the separation of powers as a 'value of a high order,'" but reasoned that *Will* "does not support the broad principle" asserted by petitioners "that all district court orders that reject separation of powers defenses are immediately appealable under the collateral order doctrine." *Id.* at 12a. Reviewing this Court's decisions, the court of appeals observed that in all the cases in which separation-of-powers concerns had been held to satisfy the standard for appeal under the collateral order doctrine, a claim of immunity had been involved. *Id.* at 12a-14a.

A majority of the court of appeals, with Judge Kavanaugh dissenting, also denied petitioners' alternative

request for a writ of mandamus. The majority concluded that petitioner had "not established a 'clear and indisputable' right to have these claims dismissed under the political question doctrine." Pet. App. 22a. In reaching this conclusion, the majority emphasized the high standard for granting mandamus relief, *id.* at 16a, the qualified nature of the United States' description of the risks of the litigation (noting that it was "predictive and contingent" upon such factors as "the nature, extent, and intrusiveness of discovery"), *id.* at 17a (quoting July 2002 statement of interest), and that "the State Department ha[d] made no further request of the district court" after the district court's order and had not joined petitioners' request for mandamus in the court of appeals, *id.* at 22a. The majority concluded that it was unnecessary to "decide what level of deference would be owed to a letter from the State Department that *unambiguously* requests that the district court dismiss a case as a non-justiciable political question," while noting that if it had misconstrued the State Department's filings, the government could clarify its position with a new filing in district court. *Id.* at 18a. Finally, the majority distinguished "the instant case, in which the district court allowed a common law tort suit to proceed against a private defendant," from cases raising a more direct interference with a foreign sovereign's property or independence or the Executive's conduct of foreign relations. *Id.* at 20a-21a.

Judge Kavanaugh, while not addressing the majority's collateral order analysis, stated that he would have granted the petition for a writ of mandamus. Pet. App. 23a-45a. Citing *Sosa*, Judge Kavanaugh noted that the Executive Branch's views must be given "serious weight." *Id.* at 31a-34a. He reasoned that "the key question for purposes of mandamus (as it is for assessing justiciability) is whether the Executive Branch has reasonably explained that the

foreign policy interests of the United States would be adversely affected." *Id.* at 43a. He believed that standard was satisfied by the Department's July 2002 statement of interest, which he read as having called for dismissal of respondents' lawsuit, not just for narrowing its scope to reduce foreign policy concerns. *Id.* at 39a. Judge Kavanaugh also noted that it was "common ground" between himself and the majority that, on remand, "the District Court should dismiss the case if the State Department reasonably and unambiguously states that litigation of the state-law claims would affect U.S. foreign policy interests." *Id.* at 44a-45a.

DISCUSSION

The district court carefully considered concerns identified by the United States in its submissions to that court. Largely on the basis of those concerns (and reaching the result the United States had advocated with respect to respondents' ATS claims), the court dismissed respondents' federal-law claims, and dismissed all claims against a defendant indirectly owned by the Indonesian government. The court did not, however, dismiss respondents' state-law tort claims against the private defendants. While the motion to dismiss was pending, the United States expressed concern that the extensive discovery sought by respondents would have adverse consequences for the Nation's foreign affairs. The district court responded by limiting discovery in a manner intended to avoid offending Indonesia's sovereign interests. In light of that procedural history and the absence of a request by the United States that the case be dismissed in its entirety, the court of appeals reasonably regarded petitioners' interlocutory appeal as one from the denial of a motion to dismiss state-law tort claims based on an assertion by private defendants, not by the Executive, that the

litigation itself would have adverse consequences for the Nation's foreign policy interests and thus raised separation-of-powers concerns.

In those circumstances, the court of appeals' determination that the district court's refusal to dismiss respondents' state-law tort claims under the political question doctrine was not immediately appealable under the collateral order doctrine was correct and does not warrant this Court's review. There is no circuit conflict on that issue. Moreover, the court of appeals concluded that this case did not clearly involve the premise on which petitioners rest their question presented—*i.e.*, that there was a warning by the Executive that the litigation itself, even as substantially narrowed by the district court, would risk a potentially serious adverse impact on significant foreign policy interests of the United States. See Pet. i. And the majority below appeared to contemplate that appellate review may be available through mandamus relief in that situation in any event. In this case, however, petitioners have not sought review of the court of appeals' denial of mandamus relief. For those reasons, the petition for a writ of certiorari should be denied.

1. The collateral order doctrine, recognized in *Cohen* v. *Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949), permits immediate appeal from a "small class" of rulings that do "not conclud[e] the litigation, but conclusively resolv[e] claims of right separable from, and collateral to, rights asserted in the action." *Will* v. *Hallock*, 546 U.S. 345, 349 (2006) (internal quotation marks omitted). To be immediately appealable under the collateral order doctrine, an order must "[1] conclusively determine the disputed question, [2] resolve an important issue completely separate from the merits of the action, and [3] be effectively unreviewable on appeal from a final judgment." *Puerto Rico Aqueduct & Sewer Auth.* v. *Metcalf & Eddy, Inc.*, 506

U.S. 139, 144 (1993) (internal quotation marks and citation omitted). The Court applies "stringent" conditions on the collateral order doctrine so that it does not "overpower the substantial finality interests [28 U.S.C.] § 1291 is meant to further." *Will*, 546 U.S. at 349-350.

In this case, the court of appeals correctly recognized that the first two criteria for a collateral order appeal were satisfied. Pet. App. 9a. The district court's order denying petitioners' motion to dismiss conclusively determined that respondents' state-law claims did not present a nonjusticiable political question, an important issue separate from the merits of those state-law claims. *Ibid.* The court of appeals held, however, that the district court's order failed to satisfy the third prong of the test—that it be effectively unreviewable after final judgment in the litigation. *Id.* at 10a.

There is no doubt that a political question claim can be reviewed in an appeal from final judgment. It is equally true that in some cases much, if not all, of the value of a political question defense may be lost if discovery and trial take place. But it does not follow that the third *Cohen* factor is satisfied in every case in which a political question defense is raised. In recent cases, this Court has stressed that not every "claim of right to prevail without trial" satisfies the third element. *Will*, 546 U.S. at 351. Rather, the determination whether a particular type of order qualifies for immediate appeal requires "a judgment about the value of the interests that would be lost through rigorous application of a final judgment requirement." *Digital Equip. Corp.* v. *Desktop Direct, Inc.*, 511 U.S. 863, 878-879 (1994). Among the types of orders that have been held to qualify are those denying a motion to dismiss on the ground of a constitutional right to be free from the burdens of litigation, such as the right of non-consenting States under the Elev-

enth Amendment to be free from trial, *Puerto Rico Aqueduct & Sewer Auth.*, 506 U.S. at 142-147, a criminal defendant's right under the Fifth Amendment not to be put twice in jeopardy, *Abney* v. *United States*, 431 U.S. 651, 660 (1977), and a Member of Congress's right under the Speech or Debate Clause to be free from the burden of defending himself in court, *Helstoski* v. *Meanor*, 442 U.S. 500, 508 (1979).

Beyond instances in which the Constitution itself confers a right not to be subjected to litigation, the Court has recognized other circumstances in which "a trial * * * would imperil a substantial public interest" and delaying appeal until after trial would "effectively" deny protection for that substantial interest. *Will*, 546 U.S. at 353. Many of the instances in which the Court has recognized such a "substantial public interest" are ones in which the litigation itself implicates concerns relating to the "separation of powers." *Id.* at 352. For example, *Nixon* v. *Fitzgerald*, 457 U.S. 731 (1982), upheld immediate appeal from the denial of a claim of absolute Presidential immunity because failure to honor a meritorious assertion of such a right would compromise "compelling public ends," *id.* at 758, "rooted in * * * the separation of powers," *id.* at 749. The Court has similarly recognized that the threat of litigation against lower level government officials for conduct taken within the scope of their employment threatens the efficiency and initiative of the Executive Branch sufficiently to warrant immediate appeal from the denial of a motion to dismiss on grounds of qualified immunity, *Mitchell* v. *Forsyth*, 472 U.S. 511, 530 (1985), or under the Westfall Act, *Osborn* v. *Haley*, 549 U.S. 225 (2007).

In the foreign affairs context, the Court has exercised jurisdiction over collateral order appeals by foreign sovereigns asserting immunity from suit. See, *e.g.*, *Republic of*

Austria v. *Altmann*, 541 U.S. 677, 681 (2004); *Republic of Argentina* v. *Weltover, Inc.*, 504 U.S. 607, 610 (1992). Such suits, which could undermine the Executive's' conduct of the Nation's relations with foreign states, plainly satisfy the collateral order doctrine's third criterion. As the Court recognized in *Ex Parte Republic of Peru*, 318 U.S. 578 (1943), which came to the Court on a petition for a writ of mandamus, "it is of public importance that the action of the political arm of the Government" in recognizing a foreign state's claim of immunity "be promptly recognized, and that the delay and inconvenience of a prolonged litigation be avoided by prompt termination of the proceedings in the district court." *Id.* at 587.

2. To the extent that the court of appeals' opinion suggests that separation-of-powers considerations could support the right to avoid the burdens of trial and therefore warrant collateral order appeal only in cases involving a claim of immunity, Pet. App. 12a, the United States does not agree. Although the Court has not addressed the precise issue of the availability of a collateral order appeal in other separation-of-powers contexts, it has recognized, in cases not involving claims of "immunity," that substantial public interests would be frustrated if a defense based on the separation of powers was not vindicated at the very outset of the litigation. The rule announced in *Totten* v. *United States*, 92 U.S. 105 (1875), that courts will not entertain a breach of contract claim based on an asserted agreement between the government and the plaintiff to conduct espionage is one example of a defense rooted in the separation of powers that would satisfy the third prong of the collateral order doctrine. As the Court observed in *Tenet* v. *Doe*, 544 U.S. 1 (2005), in which the district court certified its order for immediate appeal under 28 U.S.C. 1292(b), *Tenet*, 544 U.S. at 6, the *Totten* bar was "designed not

merely to defeat the asserted claims, but to preclude judicial inquiry" into the subject at all, and therefore the defense could be decided even before resolving questions of subject matter jurisdiction, *id.* at 7 n.4.

In *Cheney* v. *United States District Court for D.C.*, 542 U.S. 367 (2004), the Court likewise recognized the importance of resolving, at the outset of the litigation, the question whether the President's energy task force, composed of cabinet-level officers and chaired by the Vice President, was subject to the public disclosure requirements of the Federal Advisory Committee Act, 5 U.S.C. App. 3(2), at 2. There, although the Court reserved the question whether the Vice President could appeal as of right under the collateral order doctrine, *Cheney*, 542 U.S. at 378-379, it observed in the context of granting the petition for a writ of mandamus that "[a]ccepted mandamus standards are broad enough to allow a court of appeals to prevent a lower court from interfering with a coequal branch's ability to discharge its constitutional responsibilities," *id.* at 382.

In the foreign affairs context, the Court has recognized that the views of the Executive Branch with regard to the implications of certain litigation for the Nation's foreign affairs would be entitled to deference. See *Sosa*, 542 U.S. at 733 n.21; *Altmann*, 541 U.S. at 702. When the Executive Branch determines that the very pendency of litigation in United States courts involving the conduct of foreign governments will frustrate the Nation's foreign policy goals, "there is a strong argument that federal courts should give serious weight to the Executive Branch's view of the case's impact on foreign policy." *Sosa*, 542 at 733 n.21. See *Altmann*, 541 U.S. at 702 (State Department's "opinion on the implications of exercising jurisdiction over *particular* [foreign government defendants] in connection with *their* alleged conduct * * * might well be entitled to deference

as the considered judgment of the Executive on a particular question of foreign policy"). When the Executive explicitly seeks dismissal because the *pendency* of the litigation will adversely affect foreign relations, a district court's refusal to defer to that determination would satisfy the third prong of the collateral order doctrine. For, in that situation, "a trial * * * would imperil a substantial public interest," such that delaying appellate review until after such a trial would "effectively" deny relief, *Will*, 546 U.S. at 353. In that case, but not in all cases in which a political question defense is raised, the very import of the defense will be lost if the suit proceeds to discovery and trial. Thus, the court of appeals was incorrect to the extent it suggested that only when an immunity from suit is asserted can separation-of-powers values support a collateral order appeal.

3. While the court of appeals was in error to that extent, it is not true that every case raising a political question defense merits collateral order review. In a case like this, when the United States identifies the manner in which further proceedings in the district court will interfere with foreign policy interests, an order designed to limit proceedings to that extent, but not going further, need not be automatically appealable. In those circumstances, the standards for mandamus review, as a complement to the Section 1292(b) certification process, are sufficient to allow appellate review when necessary. Accordingly, review is not warranted in this case to consider when separation-of-powers considerations warrant a collateral order appeal outside the context of a claim of immunity.

a. There is no circuit conflict on the question presented. The only appellate decision that petitioners cite as contrary to that of the court below is *767 Third Avenue Associates* v. *Consulate Gen. of Socialist Federal Republic of Yugoslavia*, 218 F.3d 152 (2d Cir. 2000). There is no conflict be-

tween the decisions. In *767 Third Avenue Associates*, the district court had *upheld* the defendant's assertion that the political question doctrine rendered the case nonjusticiable, *id.* at 158, and, on that basis, entered an indefinite stay of the proceedings, *id.* at 159. The court of appeals addressed the question whether the entry of an indefinite stay, as opposed to an outright dismissal, deprived the court of appellate jurisdiction. It held, following this Court's decisions in *Quackenbush* v. *Allstate Insurance Co.*, 517 U.S. 706 (1996), and *Moses H. Cone Memorial Hospital* v. *Mercury Construction Corp.*, 460 U.S. 1 (1983), that the stay order was appealable. *767 Third Ave. Assocs.*, 218 F.3d at 159. The court did not confront the question presented here, whether an order *denying* a motion to dismiss on political question grounds would satisfy the third element of the collateral order doctrine.

b. This case is not in any event a suitable vehicle for resolving the question petitioners raise. Petitioners frame the question presented (Pet. i) as whether collateral order appeal is available when the "lawsuit challenges the activities of a foreign government, and the Executive warns that the litigation itself, and not just the effects of a final judgment, would risk a potentially serious adverse impact on significant foreign policy interests of the United States." The court of appeals did not decide that question, however, because it did not believe that the factual predicate of the question as framed by petitioners was satisfied. To the contrary, the court rejected petitioners' assertion of a "conflict between the views of the State Department and those of the district court." Pet. App. 17a.

The court of appeals emphasized that the case, as it came before that court, was not one that challenged the conduct of the Indonesian government. Thus, the court pointed out that the district court had "dismissed [respon-

dents'] claims against a natural gas company that was partially owned by the Indonesian government," Pet. App. 17a, which the district court recognized as posing a "risk of interfering in Indonesian affairs," *id.* at 61a. Moreover, the United States had said that its "concerns can be avoided by holding * * * that the ATS does not create an independent right of action," *id.* at 142a, and the district court responded by granting petitioners' motion to dismiss the ATS and TVPA claims, which were premised on alleged violations of international law by the Indonesian government, *id.* at 52a-60a. The court of appeals therefore regarded respondents' case as having been narrowed to one involving state "tort claims by private plaintiffs against a private corporation." *Id.* at 20a.[1]

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[1] Of course, state-law tort claims may, under appropriate circumstances, be subject to dismissal as nonjusticiable. State-law claims, such as those asserted here, may also be subject to dismissal based upon federal preemption. Projection by a State of its legal norms onto conduct that occurs wholly outside the State is subject to constitutional limitations, even within the domestic context. See, *e.g.*, *BMW of N. Am., Inc.* v. *Gore*, 517 U.S. 559, 572 (1996) (Due Process Clause); *Healy* v. *Beer Inst.*, 491 U.S. 324, 336 (1989) (Commerce Clause); *Thomas* v. *Washington Gas Light Co.*, 448 U.S. 261, 272 (1980) (plurality) (Full Faith and Credit Clause). Those limitations also restrict a court's ability to apply the forum state's law to extraterritorial conduct pursuant to choice-of-law analysis. See *Phillips Petroleum Co.* v. *Shutts*, 472 U.S. 797, 816-817 (1985); *Allstate Ins. Co.* v. *Hague*, 449 U.S. 302, 308 (1981) (plurality). Projection by a State of its legal norms onto conduct that took place within the sovereign territory of a foreign nation presents even more serious problems of extraterritoriality, disuniformity, and interference with United States foreign policy, as this Court has recognized in cases involving preemption of conflicting state law. See *Crosby* v. *NFTC*, 530 U.S. 363, 384-386 (2000); *American Ins. Ass'n* v. *Garamendi*, 539 U.S. 396, 420-425 (2003); *Japan Line, Ltd.* v. *County of L.A.*, 441 U.S. 434, 447-449 (1979); *Zschernig* v. *Miller*, 389 U.S. 429,

For similar reasons, the court of appeals did not regard petitioners' appeal as one in which the Executive Branch had warned that the litigation itself would interfere with the Nation's foreign policy interests. The Executive had not "requested the dismissal of the action against Exxon" in its entirety, and the majority noted that the United States "did not intervene" or otherwise participate in the court of appeals in support of petitioners' appeal or its petition for mandamus. Pet. App. 22a. No decision of this Court or of any other court of appeals supports the availability of a collateral order appeal by a private party in these circumstances.

Petitioners place considerable emphasis on this Court's recognition in *Sosa* and *Altmann* of the important concerns relating to the separation-of-powers that are at stake in litigation that implicates the Nation's foreign affairs. See Pet. 15-26. But as a result of the district court's rulings narrowing the scope of respondents' suit, the case now presents neither of the particular situations discussed in *Sosa* and *Altmann*. In *Sosa*, the Court addressed the deference owed to the Executive Branch by the courts in exercising their federal-common-law-making authority under the ATS with respect to claims alleging violations of international law. 542 U.S. at 725-733. Here, the district court dismissed respondents' claims under the ATS, as the

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434-435 (1968); *Hines* v. *Davidowitz*, 312 U.S. 52, 65-68, 73-74 (1941). In such situations, where litigation implicates the United States' foreign relations, the unique federal interests at stake may require application of federal, rather than state, law. See *Banco Nacional de Cuba* v. *Sabbatino*, 376 U.S. 398, 424-427 (1964).

In his dissent, Judge Kavanaugh referred to the possibility that plaintiffs' state-law claims were preempted. Pet. App. 37a. The court of appeals did not resolve that issue however, *ibid.*, and the issue is not presented for this Court's consideration at this time.

United States had requested, as well as those under the TVPA. Pet. App. 52a-60a, 163a.[2] In *Altmann*, the Court addressed the question whether a suit against a foreign government, although within the terms of one of the exceptions to immunity in the Foreign Sovereign Immunities Act, 28 U.S.C. 1605(a) (Supp. V 2005), might nonetheless present a sufficient threat to the Nation's foreign policy interests that it should be dismissed. *Altmann*, 541 U.S. at 701-702. Here, respondents' claims against PT Arun, an Indonesian corporation that is majority owned by Indonesia's state-owned oil and gas company, were dismissed by the district court out of concern that "[a]djudicating the liability of an entity owned by the Indonesian government would create a significant risk of interfering in Indonesian affairs." Pet. App. 61a. The petition's emphasis on the troublesome nature of claims brought under the ATS and TVPA, Pet. 18-20, 23-26, and suits against foreign states, Pet. 15-17, 21-22, ignores those rulings by the district court. And in so doing, it asks the Court to resolve a question that the court of appeals did not believe was presented, and that it therefore could not have purported to answer.

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[2] At times, the petition appears to conflate the question whether a case is nonjusticiable under the political question doctrine and whether the court should recognize a cause of action under the ATS. See, *e.g.*, Pet. 26. The two inquiries, while possibly overlapping in some cases, are distinct. As this Court explained in *Sosa*, there is only a "narrow class of international norms" upon which claims may be brought under the ATS, and "the potential implications for the foreign relations of the United States of recognizing such causes should make courts particularly wary of impinging on the discretion of the Legislative and Executive Branches in managing foreign affairs." 542 U.S. at 727, 729. Under *Sosa*, foreign policy concerns can support the conclusion that a cause of action should not be recognized under the ATS regardless of whether the case presents nonjusticiable political questions.

c. Petitioners do not ask this Court to review the court of appeals' denial of their request, in the alternative, for a writ of mandamus, see Pet. i, but the court of appeals' analysis of that issue offers a further reason why review is not warranted. The majority's discussion of the mandamus issue indicates that, if it had believed the circumstances of this case to be as petitioners paint them, petitioners would have been granted the relief they seek, albeit under the procedural heading of mandamus rather than appeal as of right. The majority declined to grant mandamus on the basis of "the [State Department] letter before us in the record" because that letter did not "*unambiguously* request[] that the district court dismiss [the] case as a non-justiciable political question." Pet. App. 18a. Moreover, the majority noted that "if we have misinterpreted this letter, or if the State Department has additional concerns about this litigation, it is free to file further letters or briefs with the district court expressing its views." *Ibid.* See *id.* at 44a-45a (Kavanaugh, J., dissenting) (noting "common ground" with the majority that the district court should dismiss the remaining claims if the State Department makes a further submission that "unambiguously states that litigation of the state-law claims would affect U.S. foreign policy interests").

The court of appeals' indication that relief *may well* have been afforded (under the rubric of mandamus) had the United States explicitly sought dismissal, and the court's acknowledgment that the government could make further filings on remand to clarify its views about this case, lessen the need for this Court's review at this time of the question whether appellate review is available under the collateral order doctrine when litigation would interfere with the Nation's foreign policy interests, especially as assessed by the Executive Branch. This Court's references in *Sosa* and *Altmann* to the deference due Executive Branch state-

ments of interest are of relatively recent vintage, and there have been no decisions other than the case at bar that have considered the intersection of those decisions and the collateral order doctrine. Thus, further consideration of the issue by the courts of appeals could be of assistance to the Court. In the meantime, the apparent availability of mandamus relief from the D.C. Circuit in appropriate cases will help avoid significant interference with our relations with foreign governments. *Cf. Cheney*, 542 U.S. at 378-379 (declining to resolve question of collateral order appellate jurisdiction in light of holding that mandamus relief was appropriate).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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